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1116

No. 3032

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United States 1116  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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SWAYNE & HOYT, INCORPORATED,  
Plaintiff in Error,  
vs.

LEONARD EVERETT,  
Defendant in Error.

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**Transcript of Record.**

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Upon Writ of Error to the United States Court  
for China.

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**Filed**

AUG 25 1917

**F. D. Monckton,**  
Clerk.







**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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United States of America,  
Extraterritorial Jurisdiction in China,  
At Shanghai, China,—ss.

Record of proceedings of the United States Court  
for China in the cause and matter hereinafter  
stated, the same being disposed of during a reg-  
ular term of said Court held at the City of  
Shanghai, China, to wit, on the twenty-eighth  
day of December, 1916. Present, the Honorable  
CHARLES S. LOBINGIER, Judge of the  
United States Court for China.

Cause No. 507.

Civil Action No. 174.

AT LAW.

LEONARD EVERETT,

Plaintiff,

vs.

SWAYNE & HOYT, INCORPORATED,

Defendant.

**Statement of Clerk.**

Said action was commenced on May 17, 1916, and  
proceeded to final disposition on the day above writ-  
ten, and during the progress thereof pleadings and  
papers were filed, process was issued and returned  
and orders of the Court were made and entered in  
the order and on the dates hereinafter stated, to wit:

[1\*]

\*Page-number appearing at foot of page of original certified Transcript  
of Record.

*In the United States Court for China.*

Cause No. 507.

Civil No. 174.

LEONARD EVERETT,

Plaintiff,

vs.

SWAYNE & HOYT, INCORPORATED, a Corporation,

Defendant.

Filed at Shanghai May 17, 1916.

(Signed) EARL B. ROSE,

Clerk.

**Petition.**

The petition of the above-named plaintiff respectfully represents to this Honorable Court:

1st.

That the plaintiff is an American citizen, a resident of Shanghai, China, and is engaged in the business of shipping at said Shanghai.

2d.

That the defendant is a corporation duly incorporated under the laws of the State of California, United States of America, with its principal office and place of business at San Francisco, in said State.

3d.

That the steamship "Yucatan" is an ocean-going steam freighter owned by the north Pacific Steamship Company, an American corporation, and that said vessel is registered under the laws of the United



States of America at the port of San Francisco, California.

4th.

That the said S. S. "Yucatan" arrived at the port of Shanghai, China, on the 13th day of May, 1916, under charter from said owners to the said defendants for a voyage from the port of San Francisco, California, to ports and places in China and Japan and return to San Francisco, and for other Pacific Coast ports of the United States of America. [2]

5th.

That Jardine, Matheson & Company, Limited, a British corporation, were and are agents for said defendants at said Shanghai.

6th.

That prior to the arrival of said vessel at said Shanghai, to wit, on or about the 18th day of April, 1916, and from day to day thereafter until on or about the 5th day of May, 1916, the said defendants, through their said agents, advertised in the public press of said Shanghai that said vessel would be put on the berth at said Shanghai, and that applications for freight for a voyage to the port of San Francisco might be made to the said agents.

7th.

That on the 3d day of May, 1916, the plaintiff applied to defendants, through their said agents, for space on said vessel for from 200 to 300 tons (measurement) of freight from said Shanghai to any port on the Pacific Coast of America that said vessel might be destined for; that plaintiff, as a shipping contractor, actually had on hand at the time said offer was

made and now has on hand under contract for shipment for others to Pacific Coast ports of the United States of America over 400 tons (measurement) of cargo, consisting principally of hides and skins, and was desirous of shipping the said cargo to any Pacific Coast port of the United States of America, and was ready and willing to pay the defendants reasonable and ordinary charges for the freight so offered.

8th.

That at the time said offer was made the said defendants through their said agents were accepting offers for and allotting space to the public generally, and had at the time said offer was made by plaintiff sufficient space available in said vessel to meet the requirements of said offer. [3]

9th.

That the said defendants in placing the said steamer on the berth in Shanghai as aforesaid and in advertising for applications for space for freight for a voyage of said vessel from Shanghai to San Francisco, and in accepting the same from the public generally, were common carriers of freight for hire and as much were bound to accept plaintiff's said offer.

10th.

That the said defendants, through their said agents, on the 3d day of May, 1916, and again on May 5th, 1916, refused the plaintiff's said application for space and offer to ship as aforesaid by the said vessel on said voyage, upon the ground that they did not have space available on said vessel, but that thereafter, to wit, on the 8th day of May, 1916, after



plaintiff had called to the attention of said agents that they had allotted space to others applying at a date subsequent to the time of plaintiff's said application, the said agents of the defendants offered the plaintiff space on said vessel for said voyage provided the freight offered by the plaintiff should be passed by the British Consul at Shanghai and provided plaintiff did not offer more freight (or cargo) than the space at the disposal of said agents for the defendants.

## 11th.

That plaintiff declined to agree to the aforesaid conditional acceptance of said offer by said defendants through their said agents, in so far as it related to the submission of the freight offered by plaintiff to the approval of the British Consul at said Shanghai, and demanded that the defendants through their said agents accept said freight without said last-mentioned condition. That defendants through their said agents refused to comply with said demand. [4]

## 12th.

That plaintiff has been damaged by the acts and conduct of said defendants to the amount of the difference between the price at which plaintiff had contracts with others for the shipment of said freight and the price at which the said defendants were accepting freight of a similar character from the public at Shanghai, China, and that said difference is the sum of Four Thousand Five Hundred (\$4,500) Dollars, United States gold coin.

WHEREFORE plaintiff prays for judgment against said defendant for said sum of Four Thousand Five Hundred (\$4,500) Dollars, United States gold coin, for costs, and for such other further or different relief as to the Court may seem meet.

Dated Shanghai, May 17th, 1916.

L. EVERETT,  
Plaintiff.

FLEMING & DAVIES,  
Attorneys for Plaintiff.

United States Court for China,  
Extraterritorial Jurisdiction in China,—ss.

Leonard Everett, being first duly sworn, deposes and says: That he has read the above and foregoing petition by him subscribed and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

EARL B. ROSE,  
Clerk, United States Court for China.  
May 17, 1916. [5]

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*United States Court for China.*

Cause No. 507.

Civil No. 174.

LEONARD EVERETT,  
Plaintiff,

vs.

SWAYNE & HOYT, INCORPORATED, a Corporation,  
Defendant.

Filed at Shanghai, June 15, 1916.

(Signed) EARL B. ROSE.

**Demurrer.**

The defendant above named, appearing by Jernigan and Fessenden, its attorneys, demurs to the petition herein on the ground that it appears upon the face of the petition that the Court has not jurisdiction of the person of the defendant, in that it appears from said petition that defendant is a corporation organized and existing under the laws of the State of California, United States of America, and having its principal office and place of business at San Francisco, in said State of California, and it does not appear from said petition that said defendant has any office, branch, place of business or property in China, or any official, agent or representative residing or being in China, over whom this Court has jurisdiction.

Dated Shanghai, June 15th, 1916.

(Sgd.) JERNIGAN & FESSENDEN,

Counsel for Defendant. [6]

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*In the United States Court for China.*

Cause No. 507.

LEONARD EVERETT,

Plaintiff,

vs.

SWAYNE & HOYT, INCORPORATED, a Corporation,

Defendant.



Filed July 17, 1916.

(Sgd.) EARL B. ROSE,

Clerk.

**Order Overruling Demurrer.**

LOBINGIER, J.;

The defendant demurs to a petition alleging that it is a corporation organized under the laws of California with its principal place of business at San Francisco; that Jardine, Matheson & Co., Ltd., a British corporation, were and are its agents at Shanghai; and that in May, last, the defendant, thru said agents, wrongfully refused to permit plaintiff to send freight on one of its vessels unless such freight "should be passed by the British Consul at Shanghai."

The demurrer is based

"on the ground that it appears upon the face of the petition that the Court has not jurisdiction of the person of the defendant in that it appears from said petition that defendant is a corporation organized and existing under the laws of the State of California, United States of America, and having its principal offices and place of business at San Francisco, in said State of California, and it does not appear from said petition that said defendant has any office, branch, place of business or property in China, or any official, agent or representative residing or being in China, over whom this Court has jurisdiction."

On first reading the above it appeared that the defendant sought to raise a question of service; but de-

fendant's counsel states that "the objection to the jurisdiction is not based upon the ground of deficient or irregular service of process." [7]

Moreover, according to most of the authorities,<sup>1</sup> at least, the demurrer itself would constitute a general appearance waiving any question of service.

Counsel for defendant, however, states the real point sought to be reached by the demurrer as follows:

"A contract of agency was made between Swayne and Hoyt of San Francisco and Jardine, Matheson of Shanghai whereby the latter acted as agents for the former in loading and despatching the steamship "Yucatan." The contract was made at, and to be performed at, Shanghai. It was therefore a contract made by an American company domiciled in California with a British Company who, to all intents and purposes of this action, are located in British territory and who performed the contract in what in so far as they are concerned is British territory. Both the place of making and the place of performance of the contract are for the purposes of this action British territory. It is therefore submitted that the rights of the parties growing out of this agency contract should be construed and governed by English law. For many years an exception to the general rules of law governing the relations of principal and agent has always been recognized in English law

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<sup>1</sup> Encyc. Pl. & Pr., II, 635.

in the case of an agent acting for a foreign principal.

It has long been established in England that an agent cannot pledge his foreign constituent's credit in the absence of express authority to that effect."

The authority <sup>2</sup> cited in support of this contention does not seem to us to go to the extent claimed even where the action is founded upon a contract; for the case merely holds that a vendor who gives credit to an agent believing him to be the principal, and to whom the real principal has paid, cannot, after discovering the latter, hold him liable. It appears to be very far removed from anything here and while some language used in the opinion might have a bearing on the present situation it could hardly be accepted as controlling.

For the question here is not the interpretation or enforcement of a contract but the determination of an American corporation's liability for an alleged tort and we have been cited to no authority, American or English, to the effect that even tho, as between the parties, a contract of agency might be construed according to foreign law, the tortious liability of the principal to third parties would likewise need to be so construed. If defendant were doing business here thru American agents there could be no question of its liability for torts committed by them within the scope of their agency. Can it be that they may evade such liability merely by select-

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<sup>2</sup> *Armstrong v. Stokes*, L. R. 7 Q. B. 598; 41 L. Q. B. 253; 2 English Ruling Cases, 471. [8]



ing British agents? Under the act of Congress "the laws of the United States" are "extended over all citizens of the United States" in China "and *over all others* to the extent that the terms of the treaties respectively justify or require."<sup>3</sup> Would it be consistent with this language to hold that a citizen (natural or ~~judicial~~ <sup>judicial</sup>) of the United States could place himself under different laws by employing a foreign agent?

The case<sup>4</sup> cited by plaintiff's counsel seems much more analogous to that at bar than the one cited by defendant, the sole difference being that this action is brought in an extraterritorial jurisdiction. In view of the statutory language just quoted we are unable to see that this fact should require the application of a different doctrine.

Nor can we accept and apply to this court the doctrine advanced on the unsupported opinion of a text writer<sup>5</sup> with reference to the British consular courts that all parties to litigation before them must be habitually within their territorial jurisdiction. Regardless of whether such a doctrine is authorized under British legislation (and no authorities are cited) we find no American legislation which justifies it. On the contrary the courts of which this is the successor were expressly

"invested with all the judicial authority necessary to execute the provisions of such treaties,

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<sup>3</sup> U. S. Revised Statutes, sec. 4086.

<sup>4</sup> *Barrow Steamship Co. v. Kane*, 170 U. S. 100, 42 Law Ed. 964.

<sup>5</sup> Piggot, *Extraterritoriality*, 199, 200. [9]

respectively, in regard to civil rights, whether of property, or person; and they shall entertain jurisdiction in matters of contract, at the port where, or nearest to which, the contract was made, or at the port at which, or nearest to which, it was to be executed, and in all other matters, at the port where, or nearest to which, the cause of controversy arose, or at the port where, or nearest to which, the damage complained of was sustained, provided such port be one of the ports at which the United States are represented by consuls. Such jurisdiction shall embrace *all controversies* between citizens of the United States, or others, provided for by such treaties, respectively.”<sup>6</sup>

We see nothing in this, or in any legislation of Congress, which limits the jurisdiction of the Court to parties resident in China. On the contrary the American courts here are expressly given jurisdiction of “all controversies between citizens of the United States” without <sup>reservation</sup> ~~restitution~~ as to residence. Nor does the attempt to apply a doctrine, which confessedly is no part of the jurisprudence of the United States, merely because an American corporation has selected agents of another nationality, seem to us consistent with the provisions just quoted.

The demurrer is accordingly overruled.

By the Court,

CHARLES S. LOBINGIER,

Judge.

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<sup>6</sup> U. S. Revised Statutes, sec. 4085. [10]

*In the United States Court for China.*

Cause No. 507.

Civil No. 174.

LEONARD EVERETT,

Plaintiff,

vs.

SWAYNE & HOYT, INCORPORATED, a Corporation,

Defendant.

Filed at Shanghai, July 20, 1916.

(Sgd.) EARL B. ROSE,  
Clerk.

**Answer.**

Defendant in answer to the petition of plaintiff herein respectfully shows to the Court and alleges as follows:

1. Defendant admits the allegations set forth in paragraphs one to five, inclusive, of said petition.

2. In answer to paragraph six of said petition, defendant alleges that the advertisement in the public press as in said paragraph set forth was made in the name of Jardine Matheson & Co.

3. In answer to paragraph seven of said petition, defendant admits that plaintiff applied to Jardine Matheson & Co. for space on said vessel as in said paragraph alleged but defendant has no knowledge or information sufficient to form a belief as to the truth of the other allegations in said paragraph seven set forth and therefore denies same.



4. Defendant admits the allegations set forth in paragraph eight of said petition.

5. In answer to paragraph nine of said petition, defendant admits that it was acting as a common carrier, but denies that it was bound to accept plaintiff's offer for reasons hereinafter set forth.

6. In answer to paragraph ten of said petition, defendant admits that its agents Jardine Matheson & Co. refused plaintiff's application for space on said vessel, and subsequently offered to accept plaintiff's freight upon conditions which were refused by plaintiff as in said paragraph ten set forth. [11]

7. Defendant admits that its agents Jardine Matheson & Co. refused to comply with plaintiff's demands as in paragraph eleven of said petition alleged.

8. Defendant denies each and every allegation set forth in paragraph twelve of said petition.

9. Defendant further alleges that at the times mentioned in plaintiff's petition a state of war existed between Great Britain and Germany.

10. That defendant's agents Jardine Matheson & Co. are British subjects and as such were prohibited and prevented by British law and Orders in Council, rules, regulations and decrees of the British Government from dealing in any way directly or indirectly with German subjects, or their agents, or German enemy goods.

11. That plaintiff at the times mentioned in said petition was acting as an agent for German subjects and the cargo offered to Jardine Matheson & Co., defendant's agents, by said plaintiff for shipment by

the said steamship "Yucatan" was cargo owned by and belonging to German enemy subjects of Great Britain.

12. That defendant's agents Jardine Matheson & Co. were prohibited and prevented by the authorities of the British Government from accepting and shipping the cargo offered by plaintiff.

13. That neither defendant nor its agents Jardine Matheson & Co. have committed any tort or breach of legal duty or obligation to plaintiff.

WHEREFORE, defendant prays that the petition herein be dismissed with costs and for such other and further relief as to the Court may seem meet.

(Signed) JERNIGAN and FESSENDEN,  
Counsel for Defendant. [12]

Shanghai, China.

On this 20th day of July, 1916, before me personally came Vivian Hugo Lanning, who being by me duly sworn did depose and say that he is clerk of the said Shipping Department of Jardine Matheson & Co., that he has read the foregoing answer and knows the contents thereof and that the matters therein alleged are true to the best of his knowledge, information and belief.

(Signed) VIVIAN HUGO LANNING.

Subscribed and sworn to before me this 20th day of July, 1916.

(Signed) EARL B. ROSE,  
Clerk United States Court for China. [13]

*In the United States Court for China.*

Cause No. 507.

Civil No. 174.

LEONARD EVERETT,

Plaintiff,

vs.

SWAYNE and HOYT, INCORPORATED,

Defendants.

Filed at Shanghai, Nov. 23, 1916, by leave of Court.

PAUL McRAE,

Acting Clerk.

**Replication.**

Now comes the plaintiff herein and in reply to the answer of the defendant herein,

1st.

Admits the allegations contained in paragraphs 9 and 10 of said answer.

2d.

In reply to paragraph 11 of said answer, plaintiff admits that as a part of his business as shipping agent he has accepted cargo from German subjects and admits that the cargo mentioned in the petition herein came into his possession from German subjects, and that he received his instructions as to shipment of the same from German subjects, but as to whether said cargo at the time he offered the same for shipment to the defendant was owned by German subjects as alleged in said answer, plaintiff has not



sufficient knowledge to form a belief and therefore leaves the said defendant to its proof thereof.

3d.

Replying to paragraph 12 of the said answer, plaintiff admits that defendant's agents, Jardine Matheson & Co., were prohibited and prevented by the authorities of the British Government from accepting and shipping the cargo offered by plaintiff [14] but alleges that this was because the said authorities of the British Government had placed the plaintiff on what was known as the British blacklist (the same being a list of neutrals with whom British subjects were prohibited from having business dealings) or because the said British authorities suspected that said cargo was owned by German subjects; but plaintiff alleges that notwithstanding such prohibition and prevention of the agents of the defendant by the authorities of the British Government the said defendant was not excused from its duty to accept and ship said cargo.

WHEREFORE, plaintiff claims judgment as prayed for in the petition herein.

L. EVERETT,  
Plaintiff.

FLEMING and DAVIES,  
Attorneys for Plaintiff.

United States Court for China,  
Extraterritorial Jurisdiction in China,—ss.

Leonard Everett, being first duly sworn, deposes and says: I am the plaintiff in the above-entitled action; I have read the above and foregoing replication by myself and my attorneys subscribed and

know the contents thereof, and that the same is true to the best of my knowledge, information and belief.

L. EVERETT.

Subscribed and sworn to before me this 23 day of November, 1916.

PAUL McRAE,  
Acting Clerk. [15]

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*In the United States Court for China.*

Cause No. 507.

Civil No. 174.

LEONARD EVERETT,

Plaintiff,

vs.

SWAYNE & HOYT, INCORPORATED, a Corporation,

Defendant.

Filed December 28, 1916.

(Sgd.) PAUL McRAE,  
Acting Clerk.

**Opinion.**

**SYLLABUS.**

1. Under the Anglo-American law, it is the duty of a common carrier to serve all applicants alike unconditionally and without discrimination.
2. Such a carrier is not justified in refusing to accept freight except on condition that the shipper obtains a third party's consent.
3. The carrier is relieved from such duty by the Act of God or the public enemy; but not by causes

which he can remove, nor, according to the weight of authority, by the acts of his own servants.

4. Nor is it a sufficient excuse for such refusal that the carrier's agents are subjects of a foreign power which prohibits trade with the applicant or his customers.
5. The applicant's measure of damages for such refusal is reimbursement for actual loss incurred and this includes assured profits from a pending contract.
6. It is not necessary for the applicant to prove that the carrier knew of such contract.
7. But against such profits must be charged any reduction which would result from shipping the goods by another available carrier.

Messrs. FLEMING & DAVIES, by Mr. FLEMING,  
for Plaintiff.

Messrs. JERNIGAN & FESSENDEN, by Mr. FESSENDEN, for Defendant. [16]

LOBINGIER, J.:

This is an action to recover damages from a common carrier for its alleged wrongful refusal to accept and transport goods. The petition avers and the answer admits that the defendant is an American corporation, and the steamship "Yucatan" an American freighter which

"arrived at the port of Shanghai, China, on the 13th day of May, 1916, under charter from said owners to the said defendants for a voyage from the port of San Francisco, California, to ports



and places in China and Japan and return to San Francisco, and for other Pacific Coast ports of the United States. (Par. 4.)

That the said defendants through their said agents on the 3d day of May, 1916, and again on May 5, 1916, refused the plaintiff's said application for space and offer to ship as aforesaid by the said vessel on said voyage upon the ground that they did not have space available on said vessel, but that thereafter, to wit, on the 8th day of May, 1916, after plaintiff had called to the attention of said agents that they had allotted space to others applying at a date subsequent to the time of plaintiff's said application, the said agents of the defendants offered the plaintiff space on said vessel for said voyage provided the freight offered by the plaintiff should be passed by the British Consul at Shanghai and provided plaintiff did not offer more freight (or cargo) than the space at the disposal of said agents for the defendants. (Par. 10.)

That plaintiffs declined to agree to the aforesaid conditional acceptance of said offer by said defendants through their said agents in so far as it related to the approval of the British Consul at said Shanghai, and demanded that the defendants through their said agents accept said freight without said last-mentioned condition. That defendants through their said agents refused to comply with said demand." (Par. 11.)

By way of justification for this admitted refusal the answer alleges:

“That defendant’s agents Jardine Matheson & Co. are British subjects and as such were prohibited and prevented by British Law and Orders in Council, rules, regulations and decrees of the British Government from dealing in any way directly or indirectly with German subjects, or their agents, or German enemy goods. (Par. 10.)

That plaintiff at the times mentioned in said petition was acting as an agent for German subjects and the cargo offered to Jardine Matheson & Co. defendant’s agents by said plaintiff for shipment by the said steamship “Yucatan” was cargo owned by and belonging to German enemy subjects of Great Britain. (Par. 11.)

That defendant’s agents Jardine Matheson & Co. were prohibited and prevented by the authorities of the British Government from accepting and shipping the cargo offered by plaintiff.” (Par. 12.) [17]

Plaintiff in his replication,

“admits that defendant’s agents, Jardine, Matheson & Company, were prohibited and prevented by the authorities of the British Government from accepting and shipping the cargo offered by plaintiff but alleges that this was because the said authorities of the British Government had placed the plaintiff on what was known as the British blacklist (the same being a list of neutrals with whom British subjects

were prohibited from having business dealings) or because the said British authorities suspected that said cargo was owned by German subjects.” (Par. 3.)

Defendant having elsewhere admitted that “it was acting as a common carrier” and its refusal to accept plaintiff’s freight being thus likewise admitted the naked legal question is presented whether the justification offered for such refusal is sufficient; for no testimony is produced except that of plaintiff and some depositions in support of the petition. The question of liability must, therefore, be determined largely upon the pleadings.

It is an ancient doctrine that

“Common carriers owe to the public the duty of carrying indifferently for all who may employ them, and in the order in which the application is made, and without discrimination as to terms.”<sup>1</sup>

The doctrine comes to us directly from the common law,<sup>2</sup> but is probably older, for there was a similar

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<sup>1</sup> 6 Cyc. 372. Cf. see 10 C. J., 66, and Covington Stock Yards Co. v. Keith, 139, U. S. 128, 35 Law ed. 73; Toledo, etc. R. Co. v. Wren, (Ohio), 84 N. E. 785.

<sup>2</sup> “The early law as to common carriers is thus given in a case of the date of 1683: ‘Action on the case, for that whereas defendant is a common carrier from London to Lymmington *et abinde retrauum*, and setting it forth as the custom of England, that he is bound to carry goods, and that the plaintiff brought him such a pack, he refused to carry them tho offered his hire. And held by Jefferies, C. J., that the action is maintainable, as well as it is against an innkeeper for refusing a guest, or a smith on the road who refuses to shoe a horse,



one in the civil law<sup>3</sup> which the common law may have borrowed<sup>4</sup> and, each applies equally to carriers by land or, such as defendant, by water.<sup>5</sup>

Subject to the exceptions presently to be noted this duty is imperative. It cannot be evaded nor, on the whole, limited by contract.<sup>6</sup> Even where the commodity offered for shipment is under a general legal ban (as intoxicating liquor) the carrier cannot refuse to transport it if the particular consignee is not barred from receiving it.<sup>7</sup>

The grounds which will justify a refusal to perform the duty are few. Those usually enumerated in the books are, in the quaint language of the early common law, the "Act of God" (a catastrophe not due to human agency)<sup>8</sup> or of the public enemy.<sup>9</sup> The latter does not include mob violence.<sup>10</sup> Whether it includes a strike is a question on which the courts have divided. The existence of a strike by other than the carrier's employees, and which blocks all

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being tendered satisfaction for the same. Note, that it was alleged and proved that he had convenience to carry the same; and the plaintiff had a verdict.' Jackson v. Rogers, 2. Show, 327, 89 Eng. Reprint, 965." Jones' Blackstone's Commentaries, 1329.

<sup>3</sup> Hunter, Roman Law, 512; French Civil Code, Arts. 1782, 1952; Spanish Civil Code, Arts. 1601, 1783, 1784; 5 Corpus Juris, 378.

<sup>4</sup> But see *contra*, Cockburn, C. J., in Nugent v. Smith, 1 C. P. D. 423.

<sup>5</sup> 6 Cyc. 368. Cf. note 2, *supra*. [18]

<sup>6</sup> 6 Cyc. 392; 10 C. J., 66.

<sup>7</sup> Royal Brewing Co. v. Missouri etc. R. Co., 217 Fed. 146.

<sup>8</sup> Id. 377.

<sup>9</sup> 6 Cyc. 379.

<sup>10</sup> Id.

traffic, has been held to relieve the carrier of its duty to receive and transport freight.<sup>11</sup> But the decision<sup>12</sup> cited by defendant's counsel is the only one which we have been able to find to the effect that a strike of the carrier's *own employees* will afford such excuse. There is older and ampler authority<sup>13</sup> (ignored in that opinion) for the contrary doctrine. The question came before the New York Court of Appeals as early as 1859 in a case<sup>14</sup> where a railroad company sought to escape its common carrier's liability on the ground that its engineers had refused to work. In an opinion by an eminent Judge (DENIO) the Court said, in language quite opposite here:

"The position that the defendants are not responsible, because the misconduct of their servants was willful and not negligent, cannot be sustained. The action is not brought on account of any injury done to the property by the engineers, but for an alleged nonperformance of a duty which the defendants owed to the owner

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<sup>11</sup> *Louisville etc. R. Co. v. Queen City Coal Co.*, 99 Ky. 217, 35 S. W. 626.

<sup>12</sup> *Murphy Hardware Co. v. Southern Ry. Co.*, — N. C. —, 64 S. E. 873.

<sup>13</sup> *Blackstock v. N. Y. etc. R. Co.*, 20 N. Y. 48, 75 Am. Dec. 372, Cf *Weed v. Panama R. Co.*, 17 N. Y. 362, 72 Am. Dec. 474; *People v. N. Y. etc. R. Co.*, 28 Hun (N. Y.), 543; 9 Am. & Eng. R. Cas. 1; *International etc. R. Co. v. Server*, 3 Tex. App. Civ. Cas. sec. 440.

Such was also the Roman Law doctrine. Bowyer, *Modern Civil Law*, 276.

<sup>14</sup> *Blackstock v. N. Y. etc. R. Co.*, 20 N. Y. 48, 75 Am. Dec. 372. [19]

of the property. If their inability to perform was occasioned by the default of persons for whose conduct they are responsible, they must answer for the consequences, without regards to the motives of those persons. \* \* \*

Those who intrust their goods to carriers have no means of ascertaining the character or disposition of their subordinate agents or servants; they have no agency in their selection, and no control over their actions. \* \* \*

Being a corporation, all their business must necessarily be conducted by agents, and if they are not liable for their acts and omissions, parties dealing with them have no remedy at all."

In a similar case <sup>15</sup> arising in Illinois the supreme court of that state said:

"It is, doubtless, the law, that railway companies cannot claim immunity from damages for injuries resulting in such cases from the misconduct of their employees, whether such misconduct be willful or merely negligent. If employees of a common carrier suddenly refuse to work, and the carrier promptly supply their places with other employees, and injury results from the delay, the carrier is responsible, such delay results from the fault of the employees."

"It is a well settled principle of law," observed Mr. Justice Biddle,<sup>16</sup> "that a delay caused by a

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<sup>15</sup> Pittsburgh etc. R. Co. v. Hazen, 84 Ill. 36, 25 Am. Rep. 422.

<sup>16</sup> Pittsburgh etc. R. Co. v. Hollowell, 65 Ind. 188, 32 Am. Rep. 63. [20]

‘strike’ or mob composed solely of the employees of a railroad company \* \* \* will not excuse the company from receiving freight according to its contract or public duty.”

The two latter quotations are *obiter dicta* but they serve to disclose an attitude of the Courts elsewhere quite inconsistent with that expressed in the North Carolina case relied upon by defendant’s counsel and appear to us to state the sounder and better doctrine. And while the facts above reviewed are not strictly parallel to those in the case at bar, still if a carrier is not relieved of liability by conduct of its employees which is contrary to its orders it would seem *a fortiori* that exemption could not be claimed where, as here, the agent’s acts are not disavowed by the carrier.

Under all the authorities, moreover the obstacle which will excuse the carrier must be one which he cannot remove with proper care. Not even an “Act of God” will relieve him if his own negligence, contributed effectively to the result.<sup>17</sup> So, altho a *bona fide* lack of shipping facilities will excuse the carrier,<sup>18</sup> it must appear that he has used ordinary care to supply them not only from the locality in question but from others<sup>19</sup> and it is no defense that he has

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<sup>17</sup> St. Louis etc. R. Co. v. Dreyfus, 43 Oka. 401, 14 Pac. 773; Georgia etc. R. Co. v. Barfield (Ga. 1907), 58 S. E. 236; Ferguson v. Southern R. Co., 91 S. C. 61, 74 S. E. 129.

<sup>18</sup> Hutchinson, Carriers, II, sec. 495.

<sup>19</sup> “For aught the evidence shows to the contrary, the appellant, by the use of ordinary care, could have sent in cars from other division points, without dis-



failed to provide them or has depended unsuccessfully upon another.<sup>20</sup> In a recent Pennsylvania case<sup>21</sup> it was observed:

“That the refusal to allow plaintiffs a siding connection was an undue and unreasonable discrimination against them was too clearly established to admit of question. The congested condition of traffic on defendant’s road, which was offered in explanation, afforded neither excuse nor extenuation. *The means of protection against such condition was in defendant’s own hands.* It was under no duty to haul more

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commoding shippers at those points, in order to supply the temporary needs of shippers at the station of Pryatt.

Although the demand for stock cars was great and unusual on the division on which Pryatt is situated during the time appellees were seeking to ship their cattle, it was the duty of the appellant to endeavor to meet this unusual demand and to satisfy the requirements of shippers from that station by exercising ordinary care to have the need supplied.” St. Louis etc. R. Co. v. Keep, — Mo. —, 168 S. W. 131.

<sup>20</sup> “It was the duty of the defendant as a common carrier to furnish reasonable facilities for the transportation of commodities along its line. The fact that it had no cars at the time of its purchase of the road, or the fact that another company had failed to supply its cars, is not sufficient answer to this requirement, unless it be shown that reasonable facilities had been provided for the procurement of cars from another company, which had proved inefficient on account of the unprecedented and unexpected emergency.” Missouri etc. R. Co. v. Sneed, 85 Ark. 293, 107 S. W. 1182.

<sup>21</sup> Cox v. Pennsylvania R. Co., — Pa. —, 85 Atl. 863. [21]

coal than could safely and conveniently be transported over its line; but a bounden duty did rest upon it, in limiting the amount to be accepted by it, because of extraordinary conditions, to show no preference as between shippers, and to treat all alike on some equitable basis."

Applying to the case at bar these principles (for no precedent on all-fours with this case has been cited or found) we must inquire whether defendant used sufficient care to avoid the situation which led it to refuse plaintiff's cargo. As we have seen their averment is that their agents were prohibited by their (not defendant's) national authorities from accepting it. But there is no claim that this prohibition was legally effective against defendant or that it could not easily have employed other agents who were exempt therefrom. In the language of the opinion last cited, therefore, "the means of protection against such condition was in defendant's own hands." And wherever such is the case the common carrier's liability continues.

We have seen, too, that the carrier cannot shift the responsibility to his employees, even where they defy his orders and assume an attitude adverse to him. There is no averment here that the acts of defendant's agents were such. For aught that appears the agents' policy was also that of the principal.

The briefs contain considerable discussion as to how far the agent's knowledge may be imputed to the principal. It may be conceded that defendant was not presumed to know the British Enemy Trading Acts but it is hard to conceive of knowledge more

important for its agents to communicate than their own restrictions as to those from whom they were permitted to accept freight. Clearly this is a matter which they should have reported to defendant and, as a rule, what they should have done they are, as regards plaintiff, conclusively presumed to have done.<sup>22</sup>

But aside from this presumption we do not see that it would aid defendant if it were proven positively that its agents did not so inform it and that it remained ignorant of the fact that its agents would not accept freight from all who might apply. That would merely show that the agents were acting adversely to their principal, which, as we have seen, will not according to the weight of authority, relieve the latter from liability.

Defendant emphasizes in its brief the fact that its "agents offered to accept the cargo provided plaintiff could procure the consent of the British Consul." But that was a *condition*; and, as we have seen, a common carrier must serve all *unconditionally* and equally, and while the common law may have been modified for the British Empire by the recent Enemy Trading Acts these have no application to Americans. Moreover the testimony (Walker's Deposition) shows that others were given space without conditions. Indeed, the petition (par. 8) alleges and the answer (par. 4) admits that defendant was "accepting offers for an allotting space to the public generally." Besides it seems clear that the agents knew plaintiff could not meet the condition.

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<sup>22</sup> 31 Cyc., 1451, 1640, 1587. [22]

We must find, therefore, that defendant has not shown exemption from its common carrier's obligation; that its duty was to receive plaintiff's freight; and that, by its refusal, it incurred liability.

## II.

The measure of damages for such refusal varies according to the status of the applicant. If he is the owner of the goods offered for shipment and the object is a sale at the destination, he is entitled to the difference between the market price at the latter and that prevailing at the point of application, less freight charges.<sup>23</sup> To this is sometimes added the element of depreciation while the goods are awaiting shipment,<sup>24</sup> [23] and always the award must be such as will reimburse the applicant for actual loss.<sup>25</sup> Thus he is entitled to recover any profits he would have realized from the refused shipment.<sup>26</sup> In a

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<sup>23</sup> 6 Cyc. 375, note 72; Hutchinson, Carriers, III, sec. 366; St. Louis etc. R. Co. v. Leder Bros., — Ark., —, 112 S. W. 744; Toledo etc. R. Co. v. Wren, 78 Ohio St., 137, 84 N. E. 785.

<sup>24</sup> Shoptaugh v. St. Louis etc. R. Co. (Mo. Appl.), 126 S. W. 752.

<sup>25</sup> *Delaware*. Williams v. Armour Car Lines (Del. 1908), 79 Atl. 919.

*Kentucky*. Louisville etc. R. Co. v. Ohio Valley R. Co., (Ky. 1914) 170 S. W. 633.

*Mississippi*. Parish v. Yazoo etc. R. Co. (Miss. 1913), 60 So. 322.

*Pennsylvania*. Hillsdale Coal & Coke Co. v. Pennsylvania R. Co., 229 Pa. 61, 78 Atl. 28.

*Texas*. Missouri etc. R. Co. v. Empire Express Co. (Tex. Civ. App.), 173 S. W. 222.

<sup>26</sup> Houston etc. R. Co. v. Campbell, 91 Tex. 551; 45 S. W. 2; Houston etc. R. Co. v. Hill, 70 Tex. 51, 7 S. W. 659; Louisville etc. R. Co. v. Queen City Coal Co., 13 Ky. Law Rep. 832.



case<sup>27</sup> where a coal company had been refused proper facilities by a common carrier the Supreme Court of Pennsylvania approved the following instruction to the jury:

“As we look at it, the only known method to get data from which to estimate what a man is damaged by reason of discrimination in not furnishing cars or other facilities of transportation is to give the shipper discriminated against what would have been a reasonably fair profit on whatever is shown to be the fairly probable output of the mine discriminated against, less what was actually shipped from such mine.”

The same authority quotes with approval this statement of the doctrine by the Supreme Court of Michigan:

“The profits lost constitute the legitimate measure of damages. The law is not so blind to justice as not to require the defendant to respond in damages, if there is any reasonable basis for their ascertainment.”<sup>28</sup>

In the case at bar plaintiff was not the owner of the goods offered for shipment and hence could not claim the measure of damages applicable to transportation for sale. But we think it clear from the authorities just reviewed that he is entitled to reimbursement for the loss incurred by the refusal of shipment, including profits therefrom. Another

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<sup>27</sup> *Hillsdale Coal & Coke Co. v. Pennsylvania R. Co.*, 229 Pa. 61, 78 Atl. 28.

<sup>28</sup> *Hitchcock v. Supreme Tent*, 100 Mich. 40, 58 N. W. 640. [24]

case<sup>29</sup> quite analogous in principle was one where plaintiff had contracted to sell railway excursion tickets in reliance upon the defendant company's promise to issue an unlimited number. It was held that the measure of plaintiff's damage for defendant's nonperformance was the profit the former would have received from the tickets he had sold.

It is admitted (p. 8) that defendant's freight rates on the "Yucatan" were G.\$16.50 per ton. But it is undisputed that plaintiff had made contracts with his customers by which he was to receive G.\$30. per ton for what he should ship for them. It appears (pp. 8, 12) that these contracts were entered into when freight rates were high in Shanghai and that by the time application for space was made to defendant there had been a fall of almost one-half—a situation so much a part of local history that this court might almost take judicial notice thereof.

There is nothing to indicate that defendant or its agents know of plaintiff's contracts with his customers. But that was not necessary.<sup>30</sup> Nor was there any speculative element in plaintiff's profits. In some of the cases above cited prospective profits were allowed on estimated sales and probable contracts. But here the contracts were actually made and the proceeds susceptible of exact calculation and it seems to us that the carrier's refusal was an even more direct and proximate cause of the loss of these profits than in the authorities heretofore cited.

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<sup>29</sup> *Houston etc. R. Co. v. Hill*, 70 Tex. 51, 7 S. W. 659.

<sup>30</sup> *Houston etc. R. Co. v. Campbell*, 91 Tex. 551, 45 S. W. 2. [25]

But we also think that something must be charged against these profits. Defendant's counsel contends that the true measure of damages here "could only be the difference between the rate at which defendant's agents accepted cargo from other shippers and the rate actually paid by plaintiff to ship his cargo by other steamers." He cites no case in which this rule is applied, but it seems reasonable to require that an applicant who is refused service by one common carrier should not charge the whole damage upon the latter if another is ready to provide service which will prevent, or at least reduce, the damage. Such a principle obtains in the law of Master and Servant;<sup>31</sup> it seems equitable and sound and we see no reason why it should not also be applied here.

Plaintiff testifies in response to his counsel's questions:

"Q. You had this cargo for shipment at \$30 a ton?

A. Yes.

Q. What ultimately became of it, did you ship it?

A. No, Arnold Karberg shipped it by some people in Kobe. They shipped the cargo to Kobe and afterwards shipped it to America and I had the cargo from the Tientsin firm shipped to Kobe for transfer to America, but I made no profit on it and the services were absolutely without remuneration, I

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<sup>31</sup> 26 Cyc. 1006, 1014. "When the defendant knew that the transportation would not be furnished, he was not bound, in order to recover for the wrong done him, to prepare and offer the wood. As argued by his counsel, it was his duty to pursue that course best calculated to lessen the damage resulting from the wrong." *Houston etc. R. Co. v. Campbell*, 91 Tex. 551, 45 S. W. 2. [26]

lost the business and the profit, besides it took up a lot of time and trouble.”

On cross-examination he states further:

“Q. You assisted in shipping the Arnold Karberg cargo thru to Japan?

A. Yes, it was done in my name and sent to the godown and insured in my name, and I can vouch that it was not in the name of Arnold Karberg who made the arrangement.

Q. In name you were the shipper.

A. As forwarding agent.”

\* \* \* \* \*

Q. Altho you could not ship it yourself still the German firm could ship it?

A. Yes, they did it thru a Japanese firm and it was not shipped in their own name.

Q. You made no effort to ship it yourself?

A. Well, I did, but they were satisfied to take it over and did it themselves.”

On being asked “the rate across the Pacific” for this shipment he replied:

“I estimate between \$25 and \$26 including all things such as lighterage, commissions.”

Elsewhere he says:

“If I could get the cargo away by the Yucatan at \$16½ why should I go to the Japanese lines for \$25 or \$26 a ton?”

It seems clear from this that plaintiff's customer was given a rate by the Japanese Company about G.\$4.50 per ton less than that fixed in the contract with plaintiff, tho the shipment was made in his name at least as “forwarding agent.” He admits in effect



(pp. 10, 13), that he did not ask, and hence was not refused, space from said company for this particular cargo, and without a positive showing to that effect, we think it would be inequitable to charge upon the defendant more than the difference between its rate and that of the Japanese Company which would be about G.\$9. per ton.

On the other hand, we do not think defendant has shown that other shipping facilities were available to plaintiff at the time. After stating that "The British firms and their allies would not do business with me," plaintiff testifies:

"Q. When the 'Yucatan' shut out that cargo you took no efforts to ship by other lines and dropped the matter?"

A. No, I beg to differ there. I tried to make negotiations or arrangements with Anderson, Meyer and other steamship people.

Q. You restricted your efforts to American steamers?

A. Yes, I might say that I tried to get a Vladivostock steamer, but the 'Yucatan' was the only vessel I could take advantage of." [27]

We might almost take judicial notice that the lines mentioned in plaintiff's testimony included all of these then operating and the burden was on defendant to show that the Japanese Company was not the only one open to plaintiff.<sup>32</sup> We must therefore find that he is entitled to recover as damages for defendant's refusal the difference between its rate and that

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<sup>32</sup> 26 Cyc., 1006. [28]

of the Japanese Company which was, as we have seen G.\$9 per ton. As it is admitted that three hundred tons were offered the whole would amount to G.\$2,700.

It is accordingly considered and adjudged that plaintiff have and recover from defendant the sum of two thousand seven hundred dollars United States currency together with his costs.

By the Court.

CHARLES S. LOBINGIER,

Judge.

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COPY.

*In the United States Court for China.*

Cause No. 507.

Civil No. 174.

LEONARD EVERETT,

Plaintiff,

vs.

SWAYNE and HOYT, INCORPORATED,

Defendant.

Filed at Shanghai. June 9, 1917.

EARL B. ROSE.

Clerk.

**Petition for Writ of Error.**

Now comes the defendant Swayne and Hoyt, Incorporated, and says that on or about the 28th day of December, 1916, this Court entered judgment herein in favor of the plaintiff and against the defendant, in which judgment and the proceedings had prior thereto in this cause certain errors were com-

mitted, to the prejudice of this defendant, all of which will in more detail appear from the assignment of errors which is filed with this petition.

WHEREFORE this defendant prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Ninth Judicial Circuit for the correction of errors so complained of, and that a transcript of the record proceedings, and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

(Sgd.) JERNIGAN & FESSENDEN,  
Attorneys for Defendant. [29]

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COPY.

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SWAYNE and HOYT, INCORPORATED,

Defendant.

Filed at Shanghai. June 9, 1917.

EARL B. ROSE.

Clerk.

**Defendant's Bill of Exceptions.**

BE IT REMEMBERED that on the 12th day of June 1916, the defendant by its counsel, Jernigan and Fessenden, filed of record, its general appearance in the above-entitled action.

Be it further remembered that on the 17th day of July, 1916, the above-entitled cause came on for hearing upon a demurrer filed by the defendant demurring to the petition of plaintiff herein on the ground that it appears on the face of the petition filed of record by the plaintiff herein that the Court has not jurisdiction of the person (corporate) of the defendant which said demurrer is in the following form, to wit:

*In the United States Court for China.*

LEONARD EVERETT,

Plaintiff,

vs.

SWAYNE and HOYT, INC.,

Defendant.

DEMURRER.

The defendant above named appearing by Jernigan and Fassenden, its attorneys, demurs to the petition hereon on the ground that it appears upon the face of the petition that the Court has not jurisdiction of the person of the defendant, in that it appears from said petition that defendant is a corporation organized and existing under the laws of the State of California, United States of America, and having its principal office and place of business at San Francisco in said State of California, and it does not appear from said petition that said defendant has any office, branch, place of business or property in China, or any official, agent, or representative residing or being in China over whom this Court has jurisdiction.



Dated at Shanghai, June 15th, 1916.

JERNIGAN and FASSENDEN,  
Counsel for Defendant. - [31]

And be it further remembered that on the 17th day of July, 1916, the opinion and order of the Court overruling said demurrer were duly entered of record to which said order the defendant did then and there except which said exception was duly allowed by the Court.

And be it further remembered that on the 23d day of November, 1916, the above-entitled cause comes on for hearing and was heard and tried upon the facts as admitted in the petition, answer and replication filed of record herein except as follows: evidence was introduced in proof of the allegation that plaintiff had on hand under contract for shipment to Pacific Coast Ports of America 400 tons of cargo as alleged in paragraph seven of said petition; evidence was introduced in proof of the damages alleged in the petition; no evidence was introduced to prove the allegations contained in paragraph eleven of defendant's answer that the cargo offered for shipment by plaintiff was owned by German subjects. The said petition, answer and replication are in the following form, to wit:

*In the United States Court for China.*

LEONARD EVERETT,

Plaintiff,

vs.

SWAYNE and HOYT, INC.,

Defendant.

## PETITION.

The petition of the above-named plaintiff respectfully represents to this Honorable Court.

1. That the plaintiff is an American citizen, a resident of Shanghai, China, and is engaged in the business of shipping at said Shanghai.

2. That the defendant is a corporation duly incorporated under the laws of the State of California, United States of America, with its principal office and place of business at San Francisco, in said State.

[32]

3. That the steamship "Yucatan" is an ocean-going steam freighter owned by the North Pacific Steamship Company an American corporation, and that said vessel is registered under the laws of the United States of America at the port of San Francisco, California.

4. That the said SS. "Yucatan" arrived at the port of Shanghai, China, on the 13th day of May, 1916, under charter from said owners to the said defendants for a voyage from the port of San Francisco, California, to ports and places in China and Japan and return to San Francisco, and for other Pacific Coast ports of the United States of America.

5. That Jardine, Matheson & Company, Limited, a British corporation, were and are agents for said defendants at said Shanghai.

6. That prior to the arrival of said vessel at said Shanghai, to wit, on or about the 18th day of April, 1916, and from day to day thereafter until on or about the 5th day of May, 1916, the said defendants through their said agents advertised in the public

press of said Shanghai that said vessel would be put on the berth at said Shanghai and that applications for freight for a voyage to the port of San Francisco might be made to the said agents.

7. That on the 3d day of May, 1916, the plaintiff applied to defendants through their said agents for space on said vessel for from 200 to 300 tons (measurement) of freight from said Shanghai to any port on the Pacific Coast of America that said vessel might be destined for; that plaintiff as a shipping contractor actually had on hand at the time said offer was made and now has on hand under contract for shipment for others to Pacific Coast ports of the United States of America over 400 tons (measurement) of cargo consisting principally of hides and skins, and was desirous of shipping the said cargo to any Pacific Coast port of the United States of America and was ready and willing to pay the defendants reasonable and ordinary charges for the freight so offered.

8. That at the time said offer was made the said defendants, through their said agents, were accepting offers for and allotting space to the public generally and had at the time said offer was made by [33] plaintiff sufficient space available in said vessel to meet the requirements of said offer.

9. That the said defendants in placing the said steamer on the berth in Shanghai as aforesaid and in advertising for applications for space for freight for a voyage of said vessel from Shanghai to San Francisco, and in accepting the same from the public generally were common carriers of freight for hire and

as such were bound to accept plaintiff's said offer.

10. That the said defendants, through their said agents, on the 3d day of May, 1916, and again on May 5, 1916, refused the plaintiff's said application for space and offer to ship as aforesaid by the said vessel on said voyage upon the ground that they did not have space available on said vessel, but that thereafter, to wit, on the 8th day of May, 1916, after plaintiff had called to the attention of said agents that they had allotted space to others applying at a date subsequent to the time of plaintiff's said application, the said agents of the defendants offered the plaintiff space on said vessel for said voyage provided the freight offered by the plaintiff should be passed by the British Consul at Shanghai and provided plaintiff did not offer more freight (or cargo) than the space at the disposal of said agents for the defendants.

11. That plaintiff declined to agree to the aforesaid conditional acceptances of said offer by said defendants, through their said agents, in so far as it related to the submission of the freight offered by plaintiff to the approval of the British Consul at said Shanghai, and demanded that the defendants, through their said agents, accept said freight without said last-mentioned condition. That defendants through their said agents refused to comply with said demand.

12. That plaintiff has been damaged by the acts and conduct of said defendants to the amount of the difference between the price at which plaintiff had contracts with others for the shipment of said freight



and the price at which the said defendants were [34] accepting freight of a similar character from the public at Shanghai, China, and that said difference is the sum of Four Thousand Five Hundred (\$4,500) Dollars, United States gold coin.

WHEREFORE plaintiff prays for judgment against said defendant for said sum of Four Thousand Five Hundred (\$4,500) Dollars, United States gold coin, for costs, and for such other further or different relief as to the Court may seem meet.

Dated Shanghai, May 15, 1916.

LEONARD EVERETT,

Plaintiff.

FLEMING and DAVIES,

Attorneys for Plaintiff.

United States Court for China,

Extraterritorial Jurisdiction in China,—ss.

Leonard Everett, being first duly sworn, deposes and says: That he has read the above and foregoing petition by him subscribed and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

EARL B. ROSE,

Clerk of the United States Court for China.

May 17, 1916.

*In the United States Court for China.*

LEONARD EVERETT,

Plaintiff,

vs.

SWAYNE and HOYT, INCORPORATED, a Corporation,

Defendant.

## ANSWER.

Defendant in answer to the petition of plaintiff herein respectfully shows to the Court and alleges as follows:

1. Defendant admits the allegations set forth in paragraphs one to five inclusive of said petition. [35]

2. In answer to paragraph six of said petition, defendant alleges that the advertisement in the public press as in said paragraph set forth was made in the name of Jardine Matheson & Co.

3. In answer to paragraph seven of said petition, defendant admits that plaintiff applied to Jardine Matheson & Co. for space on said vessel as in said paragraph alleged, but defendant has no knowledge or information sufficient to form a belief as to the truth of the other allegations in said paragraph seven set forth and therefore denies same.

4. Defendant admits the allegations set forth in paragraph eight of said petition.

5. In answer to paragraph nine of said petition, defendant admits that it was acting as a common carrier, but denies that it was bound to accept plaintiff's offer for reasons hereinafter set forth.

6. In answer to paragraph ten of said petition, defendant admits that its agents Jardine Matheson & Co. refused plaintiff's application for space on said vessel and subsequently offered to accept plaintiff's freight upon conditions which were refused by plaintiff as in said paragraph ten set forth.

7. Defendant admits that its agents Jardine Matheson & Co. refused to comply with plaintiff's

demand as in paragraph eleven of said petition alleged.

8. Defendant denies each and every allegation set forth in paragraph twelve of said petition.

9. And defendant further alleges that at the time mentioned in plaintiff's petition a state of war existed between Great Britain and Germany.

10. That defendant's agents Jardine Matheson & Co. are British subjects and as such were prohibited and prevented by British law and Orders in Council, rules, regulations and decrees of the British Government from dealing in any way directly or indirectly with German subjects, or their agents, or German enemy goods.

11. That plaintiff at the times mentioned in said petition was acting as an agent for German subjects and the cargo offered [36] to Jardine Matheson & Co., defendants' agents by said plaintiff for shipment by the said SS. "Yucatan" was cargo owned by and belonging to German enemy subjects of Great Britain.

12. That defendant's agents Jardine Matheson & Co. were prohibited and prevented by the authorities of the British Government from accepting and shipping the cargo offered by plaintiff.

13. That neither defendant nor its agents Jardine Matheson & Co. have committed any tort or breach of legal duty or obligation to plaintiff.

WHEREFORE defendant prays that the petition herein be dismissed with costs and for such other and

further relief as to the Court may seem meet.

JERNIGAN and FASSENDEN,

Counsel for Defendant.

Shanghai, China.

On this 20 day of July, 1916, before me personally came Vivian Hugo Lanning, who being by me duly sworn did depose and say that he is clerk of the shipping department of Jardine Matheson & Co.; that he has read the foregoing answer and knows the contents thereof, and that the matters therein alleged are true to the best of his knowledge, information and belief.

(Sgd.) VIVIAN HUGO LANNING,

Subscribed and sworn to before me this 20th day of July, 1916.

EARL B. ROSE,

Clerk of the United States Court for China.

*In the United States Court for China.*

LEONARD EVERETT,

Plaintiff,

vs.

SWAYNE and HOYT, INCORPORATED, a Corporation,

Defendant.

### REPLICATION. [37]

Now comes the plaintiff herein and in reply to the Answer of the defendant herein:

1. Admits the allegations contained in paragraphs 9 and 10 of said answer.

2. In reply to paragraph 11 of said answer, plaintiff admits that as a part of his business as shipping



agent he has accepted cargo from German subjects, and admits that the cargo mentioned in the petition herein came into his possession from German subjects, and that he received his instructions as to shipment of the same from German subjects, but as to whether said cargo at the time he offered the same for shipment to the defendant was owned by German subjects as alleged in said answer, plaintiff has not sufficient knowledge to form a belief and therefore leaves the said defendant to its proof thereof.

3. Replying to paragraph 12 of said answer, plaintiff admits that defendant's agents Jardine Matheson & Co. were prohibited and prevented by the authorities of the British Government from accepting and shipping the cargo offered by plaintiff, but alleges that this was because the said authorities of the British Government had placed the plaintiff on what was known as the British blacklist (the same being a list of neutrals with whom British subjects were prohibited from having business dealings) or because the said British authorities suspected that said cargo was owned by German subjects; but plaintiff alleges that notwithstanding such prohibition and prevention of the agents of the defendant by the authorities of the British Government the said defendant was not excused from its duty to accept and ship said cargo.

WHEREFORE plaintiff claims judgment as prayed for in the petition herein.

LEONARD EVERETT,

Plaintiff.

FLEMING and DAVIES,

Counsel for Plaintiff.

United States Court for China,  
Extraterritorial Jurisdiction in China,—ss.

Leonard Everett, being first duly sworn, deposes and says: [38] I am the plaintiff in the above-entitled action; I have read the above and foregoing replication by myself and my attorneys subscribed and know the contents thereof, and that the same is true to the best of my knowledge, information and belief.

(Sgd.) L. EVERETT.

Subscribed and sworn to before me this 23 day of November, 1916.

(Sgd.) PAUL McRAE,

Acting Clerk.

And it be further remembered that on the 28th day of December, 1916, the opinion and final judgment of the Court were duly entered of record, from which said final judgment the defendant appeals in pursuance of the statutes in such cases made and provided.

And now in furtherance of justice and that right may prevail, the defendant presents the foregoing bill of exceptions and prays that the same may be settled, allowed, and signed and certified by the Judge of this court in the manner provided by law.

JERNIGAN and FESSENDEN,

Attorneys for Defendant.

Service of a copy of the within bill of exceptions admitted this 8th day of June, 1917.

FLEMING and DAVIES,

Attorneys for Plaintiff. [39]

COPY.

*In the United States Court for China.*

Cause No. 507.

Civil No. 174.

LEONARD EVERETT,

Plaintiff,

vs.

SWAYNE and HOYT, INCORPORATED,

Defendant.

Filed June 19, 1917.

EARL B. ROSE,

Clerk.

**Order Settling, etc., Bill of Exceptions.**

Be it remembered that on the 9th day of June, 1917, the above-named defendant presented its Bill of Exceptions to the undersigned for settlement. And it appearing to the Court from examination of said Bill of Exceptions that the same contains all the relevant proceedings at the hearing of said cause and that all the exceptions therein set forth were taken as in said Bill of Exceptions recited, and that wherever in said Bill of Exceptions an exception was taken by the said defendant the same was allowed by the Court. And it further appearing that the said Bill of Exceptions is in all respects full, true and correct,—

NOW, THEREFORE, that the same is hereby approved, allowed and settled as the Bill of Excep-

tions in the above-entitled cause and made a part of the record herein.

Dated at Shanghai this 19th day of June, 1917.

(Sgd.) CHARLES S. LOBINGIER,  
Judge of the United States Court for China. [41]

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COPY.

*In the United States Court for China.*

Cause No. 507.

Civil No. 174.

LEONARD EVERETT,

Plaintiff,

vs.

SWAYNE and HOYT, INCORPORATED,

Defendant.

Filed at Shanghai, June 9, 1917.

EARL B. ROSE,  
Clerk.

**Assignment of Errors.**

Now comes the defendant Swayne and Hoyt, Incorporated, and in connection with its petition for a writ of error assigns the following errors upon which it will rely:

1. That the Court erred in overruling defendant's demurrer to plaintiff's petition,—

FIRST: Because it appears upon the face of said petition that the Court has not jurisdiction over the defendant corporation.

SECOND: Because an American corporation not regularly established in business in China and hav-



ing no office, place of business or property in China and conducting such business as it may do in China through agents who are British subjects is not within the extraterritorial jurisdiction in China of the United States or of the United States Court for China in the sense such extraterritorial jurisdiction is understood, created or established by the treaties between the United States and China or the statutes of the United States creating and prescribing the jurisdiction of the United States Court for China.

2. The Court erred in its judgment in holding and deciding that the fact that the British agents in China of defendant were prevented by British trading with enemy regulations and by the British law and authorities from accepting cargo for shipment by defendant's steamship did not exempt defendant from its liability as a common carrier to accept cargo tendered by plaintiff. [42]

3. The Court erred in its judgment in not holding and deciding that any law or rules or regulations to which defendant's agents in a foreign country (China) are subject which make it unlawful for said agents to accept cargo from plaintiff for shipment by defendant's vessel exonerates defendant from liability to plaintiff for the acts of its agents in refusing to accept such cargo.

4. The Court erred in its judgment in holding and deciding that defendant was not prevented from accepting plaintiff's cargo by causes beyond the control of defendant of such a character as to exempt defendant from liability to plaintiff.

5. The Court erred in entering judgment against the defendant and in favor of the plaintiff.

6. The Court erred in not entering judgment in favor of the defendant and against the plaintiff.

JERNIGAN and FESSENDEN,

Counsel for Defendant.

Due service of the above and foregoing assignment of errors admitted this 8th day of June, 1917.

FLEMING and DAVIES,

Counsel for Plaintiff. [43]

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*In the United States Court for China.*

Cause No. 507.

Civil No. 174.

LEONARD EVERETT,

Plaintiff,

vs.

SWAYNE and HOYT, INCORPORATED,

Defendant.

Filed at Shanghai, June 9, 1917.

EARL B. ROSE,

Clerk.

**Order Allowing Writ of Error and Fixing Amount of Bond.**

This 9th day of June, 1917, came the defendant by its attorneys, Jernigan and Fessenden, and filed herein and presented to the Court its petition for the allowance of a writ of error, an assignment of errors intended to be urged by it, praying also that a transcript of the record, proceedings and papers upon

which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the Court does allow the writ of error upon defendant paying into court in accordance with a stipulation of record herein made and entered into by and between counsel for the respective parties hereto the sum of Three Thousand Five Hundred (3500) Dollars, United States currency, the payment of which said sum into court as aforesaid shall operate in lieu of a supersedeas bond.

(Sgd.) CHARLES S. LOBINGIER,  
Judge of the United States Court for China. [45]

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*In the United States Court for China.*

Cause No. 507.

Civil No. 174.

LEONARD EVERETT,

Plaintiff,

vs.

SWAYNE and HOYT, INCORPORATED.

Filed at Shanghai, June 19, 1917.

EARL B. ROSE,  
Clerk.

**Writ of Error.**

The United States of America,—ss.

The President of the United States of America: To  
the Honorable Judge of the United States Court  
for China, Greeting:

Because in the record and proceedings as also in the condition of the judgment of a plea which is in the said United States Court for China, before you, between Leonard Everett, plaintiff, and Swayne and Hoyt, Incorporated, defendant, a manifest error hath happened to the great damage of the said Swayne and Hoyt, Incorporated, as is said and appears by its complainant: We being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal distinctly and openly, you send the records and proceedings aforesaid with all things concerning the same, to the Justices of the United States Circuit Court of Appeals for the Ninth Circuit at the courtrooms of said Court in the city of San Francisco, together with this writ, so that you have the same at the said place, before the Justices aforesaid, on the 18th day of July, 1917, that the record and proceedings aforesaid being inspected, the said Justices of the said Circuit Court of Appeals may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done. [47]



WITNESS the Honorable EDWARD D. WHITE,  
Chief Justice of the Supreme Court of the United  
States, this 19th day of June, in the year of our Lord  
one thousand nine hundred and seventeen.

Allowed by

CHARLES S. LOBINGIER,  
Judge of the United States Court for China.

Attest: EARL B. ROSE,  
Clerk of the United States Court for China. [48]

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*In the United States Court for China.*

Cause No. 507.

Civil No. 174.

LEONARD EVERETT,

Plaintiff,

vs.

SWAYNE and HOYT, INCORPORATED,

Defendant.

Filed at Shanghai, June 19, 1917.

EARL B. ROSE,  
Clerk.

**Citation on Writ or Error.**

The United States of America,—ss.

To Leonard Everett, Greeting:

You are hereby cited and admonished to be and  
appear at a session of the United States Court of  
Appeals for the Ninth Circuit to be holden at the  
city of San Francisco, on the 18th day of July next,  
pursuant to a writ of error filed in the clerk's office  
of the United States Court for China, wherein

Swayne and Hoyt, Incorporated, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable CHARLES S. LOBIN-  
GIER, Judge of the United States Court for China,  
this 19th day of June, 1917.

EARL B. ROSE,

Clerk of the United States Court for China.

We hereby, this —— day of ——, 1917, accept due personal service of this citation on behalf of Leonard Everett, defendant in error.

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Counsel for Defendant in Error. [50]

City of Shanghai, to wit:

I hereby certify that I received the within citation at 10 o'clock A. M. on July 7th, 1917, and that I personally served it upon Leonard Everett, in his office, at 1A Jinkee Road, Shanghai, at 10:30 o'clock A. M. July 7th, 1917 by showing it to him and delivering to him a copy thereof.

Given under my hand this the 7th day of July in the year, 1917.

PAUL McRAE,

Marshal of the United States Court for China. [51]

COPY.

*In the United States Court for China.*

Cause No. 507.

Civil No. 174.

LEONARD EVERETT,

Plaintiff,

vs.

SWAYNE and HOYT, INCORPORATED,

Defendant.

Filed at Shanghai, June 9, 1917.

EARL B. ROSE,

Clerk.

**Stipulation for Payment of Money into Court in Lieu  
of Supersedeas Bond on Appeal.**

It is hereby stipulated by and between the undersigned counsel for the respective parties in the above-entitled cause that in lieu of executing a supersedeas bond the said defendant shall pay into this Court the sum of Three Thousand Five Hundred Dollars (\$3,500), United States currency which said sum may be deposited in bank by the Court and which said sum shall be held by the Court upon the condition that if the above-named defendant shall prosecute its writ of error against the judgment entered of record in the above-entitled action to effect and shall answer all damages and costs that may be awarded against it in event of its failure to secure a reversal of said judgment, then the above-named sum of money shall be returned to said defendant; otherwise the amount of said judgment and costs

and the costs of said appeal shall be paid to the said plaintiff out of the aforesaid sum and the overplus, if any there be, shall be returned to the said defendant.

FLEMING and DAVIES,

Counsel for Plaintiff,

JERNIGAN and FESSENDEN,

Counsel for Defendant. [52]

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COPY.

*In the United States Court for China.*

Cause No. 507.

Civil No. 174.

LEONARD EVERETT,

Plaintiff,

vs.

SWAYNE and HOYT, INCORPORATED,

Defendant.

Filed at Shanghai, June 9, 1917.

EARL B. ROSE,

Clerk.

**Praeipce for Transcript.**

To the Clerk of the Above-entitled Court:

You are hereby requested to prepare a transcript of the record herein to be filed in the United States *Circuit of Appeals* for the Ninth Circuit pursuant to a writ of error allowed in the above-entitled cause and to include in said transcript the following pleadings, proceedings and papers on file, to wit:



1. Petition.
2. Demurrer.
3. Opinion and Order Overruling Demurrer, entered July 17th, 1916.
4. Answer.
5. Replication, dated November 23d, 1916.
6. Opinion and Judgment entered 28th day of December, 1916.
7. Petition for Writ of Error.
8. Bill of Exceptions.
9. Order Allowing and Settling Bill of Exceptions.
10. Assignment of Errors.
11. Order Allowing Writ of Error.
12. Writ of Error.
13. Citation and Service of same.
14. Stipulation of Counsel Providing for Payment of Money into Court in Lieu of Supersedeas Bond.
15. Copy of this Praecipe.

And file said transcript with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

JERNIGAN and FESSENDEN,  
Attorneys for Defendant. [54]

**Return to Writ of Error.**

United States of America,  
Extraterritorial Jurisdiction in China,  
at Shanghai, China,—ss.

In pursuance of the command of the writ of error within, I, Earl B. Rose, Clerk of the United States Court for China, herewith transmit a true copy of the

record, bill of exceptions, assignment of errors and all proceedings in this case of Leonard Everett, plaintiff, versus Swayne and Hoyt, Incorporated, Defendant, lately pending in the United States Court for China, under my hand and the seal of said Court.

Witness my official signature and the Seal of said United States Court for China at the City of Shanghai, within the jurisdiction of said Court this seventh day of July, 1917.

[Seal]

EARL B. ROSE,

Clerk of the United States Court for China. [56]

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[Endorsed]: No. 3032. United States Circuit Court of Appeals for the Ninth Circuit. Swayne & Hoyt, Incorporated, Plaintiff in Error, vs. Leonard Everett, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States Court for China.

Filed August 14, 1917.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

No. 3032

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

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SWAYNE & HOYT, INCORPORATED,  
*Plaintiff in Error,*  
VS.

LEONARD EVERETT,  
*Defendant in Error.*

BRIEF FOR PLAINTIFF IN ERROR.

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IRA A. CAMPBELL,  
MCCUTCHEN, OLNEY & WILLARD,  
JERNIGAN & FESSENDEN,  
*Attorneys for Plaintiff in Error.*





No. 3032

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

SWAYNE & HOYT, INCORPORATED,  
*Plaintiff in Error,*

VS.

LEONARD EVERETT,  
*Defendant in Error.*

## BRIEF FOR PLAINTIFF IN ERROR.

### Statement of the Case.

On May 17, 1916, Leonard Everett, an American citizen resident in Shanghai, China, and an agent there of German subjects and interests, filed this suit in the United States Court for China against Swayne & Hoyt, Incorporated, a corporation of the State of California, with its principal office and place of business in San Francisco, having as its agents at Shanghai, Jardine, Matheson & Company, Limited, a British corporation. The suit is for the recovery of damages upon the claim that the defendant\* in dereliction of its duty as a com-

\* For brevity's sake, plaintiff in error and defendant in error are herein referred to as defendant and plaintiff, respectively, as they were in the court below.

mon carrier declined, without lawful excuse, to receive certain cargo offered by plaintiff for shipment from Shanghai to Pacific Coast ports by the Steamer "Yucatan" which had been advertised as to be on the berth at Shanghai for freight to San Francisco.

By demurrer defendant presented the contention that it appeared upon the face of the petition that the court was without jurisdiction over defendant's person. The demurrer was overruled and the order of the court in that behalf is assigned as error. The first point relied upon by plaintiff in error on this writ of error will accordingly be the jurisdictional question.

The second point (and only two main points are involved) goes to the merits, and is that defendant committed no tort or breach of legal duty to plaintiff, being, under the facts disclosed by the case, lawfully excused and exonerated from what might otherwise have been its duty as a common carrier to accept for shipment the goods proffered by plaintiff.

The court below held against defendant, awarding plaintiff damages in the sum of \$2,700. Assuming defendant to have been liable, no exception is taken to the amount of the award. But it is submitted that the court was in error in finding defendant liable at all.

The facts were as follows:

Jardine, Matheson & Company, Limited, advertised in the public press of Shanghai from about April 18, 1916, to about May 5, 1916, that the "Yucatan" would be put on the berth at that port and that applications for freight for a voyage to the port of San Francisco

might be made to them. They were the agents at Shanghai for Swayne & Hoyt, Incorporated, (defendant) who had the "Yucatan" under charter for a voyage from San Francisco to China and Japan and return to San Francisco and other Pacific Coast ports of the United States. Swayne & Hoyt, Incorporated, was a California corporation. Jardine, Matheson & Company, Limited, was a British corporation. The "Yucatan" arrived at Shanghai on May 13, 1916. Prior thereto, and namely on May 3, 1916, Leonard Everett (plaintiff) applied to Jardine, Matheson & Company for space on the "Yucatan" for shipment of cargo on the voyage in prospect. At first the application was refused outright, but afterward Jardine, Matheson & Company agreed to accept the proffered cargo, provided it should be passed by the British Consul at Shanghai and provided plaintiff should not offer more cargo than the space at the disposal of the ship. Plaintiff objected to the former condition and demanded that his cargo should be accepted without it. Jardine, Matheson & Company declined to comply with the demand, the cargo in question was not shipped by the "Yucatan," and the suit followed.

Great Britain and Germany were at the time at war. As British subjects, defendant's agents, Jardine, Matheson & Company, were prohibited and prevented by British law and orders in council and by rules, regulations and decrees of the British Government from dealing in any way directly or indirectly with German subjects or their agents. As a part of his

business as shipping agent, plaintiff had accepted cargo from German subjects and the cargo he offered for the "Yucatan" came into his possession from German subjects, and he received his instructions as to its shipment from German subjects. This cargo defendant's agents, Jardine, Matheson & Company, were prohibited and prevented by the authorities of the British Government from accepting and shipping; nor were they permitted by their said government to have any business dealings with plaintiff.

There is no showing in the record that defendant, Swayne & Hoyt, Incorporated, had any knowledge of this incapacity of their agents.

It was the contention of Swayne & Hoyt, Incorporated, as defendant below, and is its contention as plaintiff in error here that under these circumstances it is not liable, though admittedly a common carrier, for the non-acceptance of the cargo tendered by plaintiff.

Two main points then are, as we have suggested, involved in this writ of error: first, whether the United States Court for China had jurisdiction over the person of the defendant; second, whether defendant, though a common carrier, was, in view of the *incapacity* (not, be it observed, as the court below erroneously assumes, *default* or *misconduct*) of its agents, obligated to receive plaintiff's cargo, the agents' incapacity being due to causes beyond their control, namely, the inhibition of their government, and not proved to have been known to their principal (the defendant).



### Specifications of Error.

Accordingly, the errors assigned and relied upon are (quoting from the assignment of errors), as to the first point,—

1. “That the court erred in overruling defendant’s demurrer to plaintiff’s petition,—

“FIRST: Because it appears upon the face of said petition that the court has not jurisdiction over the defendant corporation.

“SECOND: Because an American corporation not regularly established in business in China and having no office, place of business or property in China and conducting such business as it may do in China through agents who are British subjects is not within the extraterritorial jurisdiction in China of the United States or of the United States Court for China in the sense such extraterritorial jurisdiction is understood, created or established by the treaties between the United States and China or the statutes of the United States creating and prescribing the jurisdiction of the United States Court for China.”

And as to the second point,—

2. “The court erred in its judgment in holding and deciding that the fact that the British agents in China of defendant were prevented by British trading with enemy regulations and by the British law and authorities from accepting cargo for shipment by defendant’s steamship did not exempt defendant from its liability as a common carrier to accept cargo tendered by plaintiff.

3. “The court erred in its judgment in not holding and deciding that any law or rules or regulations to which defendant’s agents in a foreign country (China) are subject which make it unlawful for said agents to accept cargo from plaintiff for shipment by defendant’s vessel exonerates

defendant from liability to plaintiff for the acts of its agents in refusing to accept such cargo.

4. "The court erred in its judgment in holding and deciding that defendant was not prevented from accepting plaintiff's cargo by causes beyond the control of defendant of such a character as to exempt defendant from liability to plaintiff."

And, as to both points,—

5. "The court erred in entering judgment against the defendant and in favor of the plaintiff.

6. "The court erred in not entering judgment in favor of the defendant and against the plaintiff."

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## Brief of the Argument.

### I.

**THE UNITED STATES COURT FOR CHINA WAS WITHOUT JURISDICTION OVER THE PERSON OF THE DEFENDANT. THE DEMURRER TO THE PETITION SHOULD HAVE BEEN SUSTAINED.**

The United States Court for China derives its jurisdiction from the act creating it (Act of June 30, 1906, c. 3934; 34 St. at L. 814; U. S. Compiled Stats. 1916, Vol. 7, Sec. 7687 ff., p. 8165), Section 1 of which act gives it "exclusive jurisdiction in all cases and judicial proceedings whereof jurisdiction may now be exercised by United States consuls and ministers by law and by virtue of treaties between the United States and China, except in so far as the said jurisdiction is qualified by section two of this Act." The last-mentioned section simply continues the consuls' jurisdiction in minor criminal and civil cases. To determine, therefore, the

jurisdiction of the United States Court for China, we have to look to the jurisdiction vested in the United States consuls and ministers in China under the applicable United States statutes and the treaty between the United States and China. Jurisdiction in civil cases was conferred upon such officers by Section 4085 of the Revised Statutes (U. S. Compiled Stats. 1916, Vol. 7, Sec. 7635, p. 8145) as follows:

“Such officers are also invested with all the judicial authority necessary to execute the provisions of such treaties, respectively, in regard to civil rights, whether of property or person; and they shall entertain jurisdiction in matters of contract, at the port where, or nearest to which, the contract was made, or at the port at which, or nearest to which, it was to be executed, and in all other matters, at the port where, or nearest to which, the cause of controversy arose, or at the port where, or nearest to which, the damage complained of was sustained, provided such port be one of the ports at which the United States are represented by consuls. Such jurisdiction shall embrace all controversies between citizens of the United States, or others, provided for by such treaties, respectively.”

The treaties referred to are those with China, Japan, Siam, Egypt and Madagascar, but we are concerned here only with the treaty with China. It must be examined because Section 4085 of the Revised Statutes quoted above gives the consular and ministerial courts only such jurisdiction over “controversies between citizens of the United States, or others,” as is “provided for by such treaties, respectively,” viz., for present purposes, by the treaty with China.

This is the Treaty of June 18, 1858, and provides, so far as pertinent in this connection:

“All questions in regard to rights, whether of property or person, arising *between citizens of the United States in China*, shall be subject to the jurisdiction and regulated by the authorities of their own government.” (12 U. S. Stats. at Large, 1029.) (Italics ours.)

This was a controversy between citizens of the United States (Leonard Everett, plaintiff, an American citizen, and Swayne & Hoyt, Incorporated, defendant, a California corporation), but, so far from its being a controversy between citizens of the United States *in China* the petition, while positively alleging the plaintiff to be a resident of Shanghai and there engaged in business, avers with equal positiveness that the defendant not only was a California corporation, but had “its principal office and place of business at San Francisco, in said state” (Paragraph 2 of Petition), namely, was there domiciled or resident.

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## II.

**DEFENDANT, THOUGH A COMMON CARRIER, WAS, UNDER THE CIRCUMSTANCES OF THIS CASE, LAWFULLY EXCUSED FROM ACCEPTING THE CARGO PROFFERED BY PLAINTIFF.**

The duty of a common carrier to accept goods for transportation is not absolute. Various grounds of lawful excuse.

“There are goods which he is not bound to carry at all, and there may be circumstances which will excuse him from carrying goods even of the kind which he is engaged generally in carrying and



which generally he is bound to carry. *He may therefore sometimes lawfully refuse to accept the goods; \* \* \**” (Italics ours.)

*Hutchinson on Carriers*, Third Edition, Vol. I,  
Sec. 143, p. 152.

“Nevertheless the duty to accept for carriage and to carry goods tendered is not an absolute duty on the part of a carrier, but is subject to reasonable limitations and conditions. \* \* \* The duty of the carrier does not extend to the acceptance and the immediate transportation of freight at all hazards and in all circumstances.”

*10 C. J.*, 66.

As the court below very rightly says (*Trans.* 23), the act of God or of the public enemy will justify the carrier in refusing to carry proffered goods—just as of course they exonerate him from liability for their loss. So also carriers are bound to carry only according to the profession they make (*Oxlade v. N. E. Ry.*, 15 C. B. (N. S.) 680; *Johnson v. The Midland Railway Company*, 4 Exch. 36; *Hutchinson on Carriers*, Third Edition, Vol. I, Sec. 144, p. 152). Likewise, press of business (*Hutchinson*, supra, Sec. 146, p. 154; *10 C. J.* 67), the dangerous or prohibited character of the articles intended to be shipped (*10 C. J.*, 67), mob violence (*ibid.*) and various other causes (*10 C. J.*, 68; *Hutchinson*, supra, Sec. 147, p. 155) will excuse the carrier for non-acceptance of goods offered for shipment.

**Strikes even among the carrier's own employees will excuse the carrier if reasonably beyond its power to control. The court below in error.**

“A strike on the line of the carrier greatly embarrassing and in some instances preventing the

movement of its trains constitutes a sufficient ground for its refusal to accept goods for transportation.”

10 C. J., 67.

With all respect to the court below, we must insist that its theory (Trans. 23-24) of a distinction in legal effect between strikes *not among* and strikes *among* the carrier's employees is untenable. The question is not who were striking, but whether the strike was reasonably beyond the power of the carrier to control. In other words, the doctrine that strikes will exonerate the carrier if it cannot stop them is but a phase of the broader and, of course, recognized doctrine that a carrier is not liable for non-acceptance of cargo where the non-acceptance is properly attributable to causes beyond the carrier's control.

The court says (Trans. 24) that

*Murphy Hardware Co. v. Southern Ry. Co.*, 150  
N. C. 703, 64 S. E. 873,

is the only case it has been able to find to the effect that a strike of the carrier's own employees will afford such excuse and adds that there is older and ampler authority for the contrary doctrine. Strikes belong to relatively modern history, so that we question whether antiquity necessarily goes hand in hand in this instance with validity, and we respectfully dispute that the authority is ampler that only strikes not among the carrier's own employees will lawfully qualify its duty. In addition to the case above cited recognizing a strike even among the carrier's own employees as coming

within the scope of the doctrine, we would ask attention to the following authorities:

*Geismer v. Lake Shore & Michigan Southern Railway Company*, 102 N. Y. 563; 55 Am. Rep. 837;

*Pittsburg, Cincinnati & St. Louis R. W. Co. v. Hollowell*, 65 Ind. 188; 32 Am. Rep. 63.

True it is that these cases refer to so-called *former* employees, but all employees who strike become by that very act *instantly former* employees, so that the distinction, even if it be of intent, has no meaning.

In

*Galveston H. & S. A. Ry. Co. v. Karrer* (Texas Civil Appeals), 109 S. W. 440,

a strike among the carrier's own employees was held a good defense for a failure of the company to receive animals offered for shipment, and the court found

"that the pleading sufficiently set forth the defense of inability to transport the cattle, and it was not necessary for the company to show that the strike could not have been prevented by either the company or the civil authorities, or that the strike was then pending, causing at the time of the delay a total stoppage of transportation, and that the defendant could not control the same by any means at defendant's command, nor that the state, after being applied to by defendant, could not control said strike, and the allegations were sufficient to form a basis for proof of reasonable diligence." (Quoting from syllabus, 109 S. W. 440.)

In other words, the question is not whether the strike was of the carrier's own employees or of others, but whether it was *reasonably* (and reasonably only, not

absolutely, be it noted) within the power of the carrier to control. In their true light, then, strikes as a lawful excuse to the carrier are simply one aspect of “causes beyond the carrier’s control” as a ground of exemption from liability for non-acceptance of offered cargo. And such a cause was the reason for plaintiff’s failure to carry defendant’s cargo in the case at bar.

**The failure of defendant to accept plaintiff’s cargo was due to a cause beyond its control.**

The court below states (Trans. 28) that “no precedent on all-fours with this case has been cited or found”. The situation was indeed novel. Defendant’s agent in Shanghai was Jardine, Matheson & Company, a British corporation. Plaintiff had theretofore “accepted cargo from German subjects” and “the cargo mentioned in the petition herein came into his possession from German subjects” and “he received his instructions as to shipment of the same from German subjects” (all this on his own admission—Replication—Trans. 16). Under these conditions, Jardine, Matheson & Company were forbidden by the English Trading with the Enemy Acts and the authorities of the British Government and its rules, regulations and decrees and orders in council from dealing with plaintiff or accepting the cargo offered by him for shipment.

We thus have a case of *incapacity* (not *fault* or *misconduct* as the court below constantly suggests) on the part of defendant’s regularly appointed agents in Shanghai.

This incapacity was not a matter within the control of the agents, but was imposed on them regardless of



their wishes by a power from without, viz., the command of the British Government with which they, as British subjects, were bound to comply. The plaintiff was the agent of German subjects, he had been representing German interests prior to this litigation, and the British Government accordingly forbade its subjects to have dealings with him just as in common knowledge the American Government is now with far greater severity, as everyone knows, than England blacklisting neutrals who trade with Germany—the common enemy. The cause was, therefore, beyond the control of Jardine, Matheson & Company.

The court says that the inability of defendant to receive plaintiff's cargo was not, however, due to causes beyond *defendant's* control because it might have changed its agents and selected others who would not labor under the incapacity which Jardine, Matheson & Company suffered. But that requires that defendant should have known the situation either actually or constructively and the record discloses no such knowledge. There is no proof that defendant actually knew, and the burden was on plaintiff to make that proof because there is, under the facts of this case, no presumption of such knowledge.

This brings us to the point of sharp divergence from the view expressed in the opinion below. The opinion (Trans. 29) refers to the well-settled rule that agents will be presumed to have communicated to their principals that which it was their duty to communicate. But that presumption, as next shown, does not apply here.

No presumption here that agents communicated knowledge of their incapacity to their principal because it would have been obviously against their interest to have done so. On contrary presumption is they concealed such knowledge. Burden of proof was on plaintiff to show actual communication. He did not do so.

This rule

“imputing notice is usually based \* \* \* upon the theory that it is the duty of the agent to communicate to his principal the knowledge possessed by him relating to the subject-matter of the agency, material to the principal’s protection and interests, and the presumption that he has performed this duty. *This presumption, however, it is said, will not prevail where it is certainly to be expected that the agent will not perform his duty, as where the agent, though nominally acting as such, is in reality acting in his own or another’s interest, and adversely to that of his principal. Much less will it be entertained where the agent is openly and avowedly acting for himself and not as agent. In such cases the presumption is that the agent will conceal any fact which might be detrimental to his own interests, rather than that he will disclose it.*”

*Mechem on Agency*, Sec. Edition, Vol. 2, pp. 1399-1400.

Empatically this was a case where it was not to be expected that the agent would perform the duty of communication to the principal. This would have been a communication of Jardine, Matheson & Company’s incapacity to perform the duties of the agency. It would have been in effect a resignation of the agency and, in failing to make the communication, the agent was, if ever agents are, acting in its own interest and adversely to the interest of the principal. There is not the slightest reason why *defendant* should have

desired to refuse this cargo. There was *every reason why the agent should*, for the moment it accepted the cargo it would have subjected itself to punishment at the hands of its government. It was, therefore, to its interest both to decline the cargo and not to apprise its principal of the declination. In such a case, as Mechem says in the aforequoted excerpt,

“the presumption is that the agent will conceal any fact which might be detrimental to his own interests, rather than that he will disclose it.”

This exception to the general rule that agents are presumed to have communicated what it is their duty to communicate is so important in the present connection that we venture to cite further authority as follows:

“The rule that notice to an agent is notice to the principal does not apply when the circumstances are such as to raise a clear presumption that the agent will not transmit his knowledge to his principal; and accordingly where the agent is engaged in a transaction in which he is interested adversely to his principal or is engaged in a scheme to defraud the latter, the principal will not be charged with knowledge of the agent acquired therein, unless the fraud is of such a character that its consummation will not be interfered with by imparting the knowledge of the facts acquired by the agent to his principal.”

2 C. J. 868-70, and many cases cited.

“The rule that notice to an agent is notice to the principal, being based upon the presumption that the agent will transmit his knowledge to his principal the rule fails when the circumstances

are such as to raise a clear presumption that the agent will not perform his duty, \* \* \*”

31 Cyc. 1595.

“The general rule is, that notice of a fact acquired by an agent, while transacting the business of his principal, operates constructively as notice to the principal. This rule applies of course as well to corporations as to natural persons. *Reid v. Bank of Mobile*, 70 Ala. 199. It is based upon the principle, that it is the duty of the agent to act for his principal upon such notice, or to communicate the information obtained by him to his principal, so as to enable the latter to act on it. It has no application however to a case where the agent acts for himself, in his own interest, and adversely to that of the principal. His adversary character and antagonistic interests take him out of the operation of the general rule, for two reasons: First, that he will very likely in such case act for himself, rather than for his principal, and secondly, he will not be likely to communicate to the principal a fact which he is interested in concealing. It would be both unjust and unreasonable to impute notice by mere construction under such circumstances, and such is the established rule of law on this subject” (citing numerous cases).

*Frenkel v. Hudson*, 82 Ala. 158; 60 Am. Rep. 736.

“While the broad proposition is that notice to, or knowledge of, the agent is notice to, or knowledge of, the principal, and binding on the latter, there are notable exceptions to the rule. A principal is not bound where the character or circumstances of the agent’s knowledge are such as to make it intrinsically improbable that he will inform his principal. Bigelow, *Frauds*, 239.”

*Benton v. Minneapolis Tailoring & Manufacturing Co.*, 73 Minn. 498; 76 N. W. 265.



“The reason usually given for the rule announced by the trial judge is that, if the notice is received in the line of the agent’s authority, it is his duty to inform his principal, and the law presumes that he performs his duty; and that, ordinarily, on principles of public policy, the knowledge of the agent is imputed to the principal. Story, Agency, Sec. 140. There is, however, an exception to the general rule which is as well established as the rule itself. The rule has no application to a case where the agent is acting for himself, in his own interest, adversely to the interest of his principal. In such case the adverse character of his interest takes the case out of the operation of the general rule; because, first, he will be likely, in such case, to act for himself, rather than for his principal, and, secondly, he will not be likely to communicate to the principal a fact which he is interested in concealing. It would be, therefore, both unjust and unreasonable to impute notice by mere construction under such circumstances.”

*Union Central Life Insurance Co. v. Robinson*,  
148 Fed. 358; 8 L. R. A. (N. S.) 883.

Speaking in each case for the Supreme Court of the United States, Mr. Justice Harlan in

*American Surety Co. v. Pauly*, 170 U. S. 133,

said:

“The presumption that the agent informed his principal of that which his duty and the interests of his principal required him to communicate does not arise where the agent acts or makes declarations not in execution of any duty that he owes to the principal, nor within any authority possessed by him, but to subserve simply his own personal ends or to commit some fraud against the principal. In such cases the principal is not bound by the acts or declarations of the agent

unless it be proved that he had at the time actual notice of them, or having received notice of them, failed to disavow what was assumed to be said and done in his behalf.

And Mr. Justice Lamar in

*American National Bank of Nashville v. Miller*,  
229 U. S. 517,

said:

“This presents another phase of the oft-recurring question as to when and how far notice to an agent is notice to his principal. In view of the many decisions on the subject, it is unnecessary to do more than to apply them to the facts of this case. If Plant, within the scope of his office, had knowledge of a fact which it was his duty to declare, and not to his interest to conceal, then his knowledge is to be treated as that of the bank. For he is then presumed to have done what he ought to have done, and to have actually given the information to his principal.

“But if the fact of his own insolvency and of his personal indebtedness to the Nashville bank were matters which it was to his interest to conceal, the law does not by a fiction charge the Macon bank, of which he was president, with notice of facts which the agent not only did not disclose, but which he was interested in concealing.”

The case at bar is indisputably one where “the circumstances are such as to raise a clear presumption that the agent will not transmit his knowledge to his principal” (2 *C. J.* 869 and 31 *Cyc.* 1595, *supra*), where “the character or circumstances of the agent’s knowledge are such as to make it intrinsically improbable that he will inform his principal” (*Frenkel v. Hudson*, *supra*), where “the agent is acting for himself, in his

own interest, adversely to the interest of his principal” and where “he will not be likely to communicate to the principal a fact which he is interested in concealing” (*Union Central Life Ins. Co. v. Robinson*, *supra*, and *American National Bank of Nashville v. Miller*, *supra*).

To have imparted to Swayne & Hoyt its incapacity under the British regulations would have been tantamount to a resignation on the part of Jardine, Matheson & Co., and it is not to be presumed that they would convey, but, on the contrary, that they would conceal, facts thus fatal, if known, to the continuance of their agency, and consequently against their interest.

**Presumption of communication applies only to knowledge relating to subject-matter of agency and within scope of agent's authority. British Trading With Enemy Acts etc. not within such category.**

The presumption of communication of notice from agent to principal, furthermore, applies only as to matters within the line of the agent's authority. The knowledge must relate “to the subject-matter of the agency” (*Mechem on Agency*, Sec. Ed., Vol. 2, p. 1399), and must be acquired “while acting in the course of his employment and within the scope of his authority” (2 *C. J.* 859). “Notice to an agent in order to be notice to the principal must relate to facts so material to the purpose of the agency as to make it the agent's duty to communicate the notice to his principal” (31 *Cyc.* 1592).

No one would argue that the British Enemy Trading Acts were a part of the subject-matter of the agency between Jardine, Matheson & Company and defendant, or material to the purpose of the agency. The subject-

matter of an agency can be nothing more nor less than the business conducted by the agent. Facts material to the purpose of any agency must be facts relating directly to the business itself and not to statutes, acts of parliament and executive orders of governments. Conceding for the sake of argument that a principal must be presumed to know matters which may be fairly considered as directly connected with the subject-matter of the agency or material to the purpose of the agency, it by no means follows that the principal is presumed to know foreign law because his agent may be located in a foreign jurisdiction. In the first place a presumption cannot be based upon a presumption (*United States v. Ross*, 92 U. S. 281). Because a principal may be presumed to know certain facts within the knowledge of his agent, namely, those relating to the subject-matter of the agency this presumption cannot be the basis of a further presumption that the principal is presumed to know other facts not connected with the subject-matter or purpose of the agency merely because his agent may have knowledge of such facts.

There is also a presumption as old as the law itself that the laws of a country have no extra territorial effect. There are some exceptions, it is true, but they do not alter the general principle. By an anomaly the laws of various foreign countries do have extra territorial effect in China. This does not, however, alter the general principle. In the absence of anything to the contrary, the presumption is that the law of foreign countries does not extend to China. As the extension



of American law to Americans in China is based upon treaty, there may be a presumption that non-resident Americans are presumed to know that such is the case. However this may be, a further presumption cannot be based upon this presumption by which Americans can be presumed to know that British subjects in China are subject entirely to British law. Much less can there be any presumption that non-resident Americans by merely appointing British agents in China are bound to know the law to which such British agents are subject. We submit that nothing short of actual knowledge can bind the principal under such circumstances.

**Not shown that agent knew of Enemy Trading Acts before taking up agency. Rule that knowledge possessed by agent prior to agency will be imputed to principal therefore not applicable even if (which we dispute) knowledge of British acts material to agency and acquired within scope of agent's authority.**

We are well aware of the rule which imputes to the principal knowledge possessed by the agent prior to taking up the duties of the agency. But it does not appear from the record in this case that when Jardine, Matheson & Company were appointed Swayne & Hoyt's agents in Shanghai, the English Trading With the Enemy Acts and other regulations and governmental inhibitions which made it impossible for them to take plaintiff's cargo were in effect. Indeed, the date of the beginning of the agency is not in evidence. Plaintiff's petition simply avers (Paragraph 5th) "that Jardine, Matheson & Company, Limited, a British corporation, were and are agents for said defendants

at said Shanghai'' and that averment is admitted in the answer (Paragraph I) and the averment and admission are the sole record of the facts in this connection, no evidence to the point having been introduced. In any event, the rule under consideration is (see *31 Cyc.*, 1593, and cases cited) confined to knowledge material to the agency and, as shown above, knowledge with reference to the British governmental inhibitions cannot be said to have been in the true sense material to this agency.

**Not shown that agents when taking agency knew effect of  
British Trading With Enemy Acts, etc.**

The argument so far has granted that the agents knew what the effect of the British regulations would be. But that was not necessarily so. It does not appear from the English Trading With the Enemy Acts themselves that they were intended to have the effect which they were given in this particular instance. Neither the defendant (granting for the moment that it knew of the British acts in question) nor its agent had any reason to suppose that those acts would prevent the agent from accepting cargo from an American shipper for shipment by an American ship—nor could it be foreseen that the American shipper would be acting as he was here for German interests. The situation was one which neither the agent nor the principal could foresee or guard against.

**But plaintiff knew before proffering this cargo that it could  
not be received.**

On the other hand, Leonard Everett, the plaintiff, came offering a cargo which he knew Jardine, Mathe-

son & Company could not touch. If he was blacklisted (and he avers in his replication—Paragraph 3d—that he was) he knew it, and he knew that meant that English subjects could not deal with him because, in the view of their government, he was German-tainted. Time was perhaps when it was the fashion to rail against the blacklist, but German intrigue has forced our government to it also and, as everyone is aware, we are practicing it with a justification that all admit and with more vigor than England ever dreamed of. No American citizen can deal with those neutrals, transactions with whom the Government has proscribed because they have been found to be subserving German interests.

When plaintiff proffered Jardine, Matheson & Company his cargo, he must have done so solely for the purpose of laying a foundation for this suit—for he knew they could not take his goods, nor hold converse with him.

Dated, San Francisco,  
February 11, 1918.

Respectfully submitted,

IRA A. CAMPBELL,

MCCUTCHEN, OLNEY & WILLARD,

JERNIGAN & FESSENDEN,

*Attorneys for Plaintiff in Error.*





No. 3032

IN THE  
**United States Circuit Court of Appeals**  
For the Ninth Circuit

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SWAYNE & HOYT, INCORPORATED,	}
<i>Plaintiff in Error,</i>	
VS.	
LEONARD EVERETT,	
<i>Defendant in Error.</i>	

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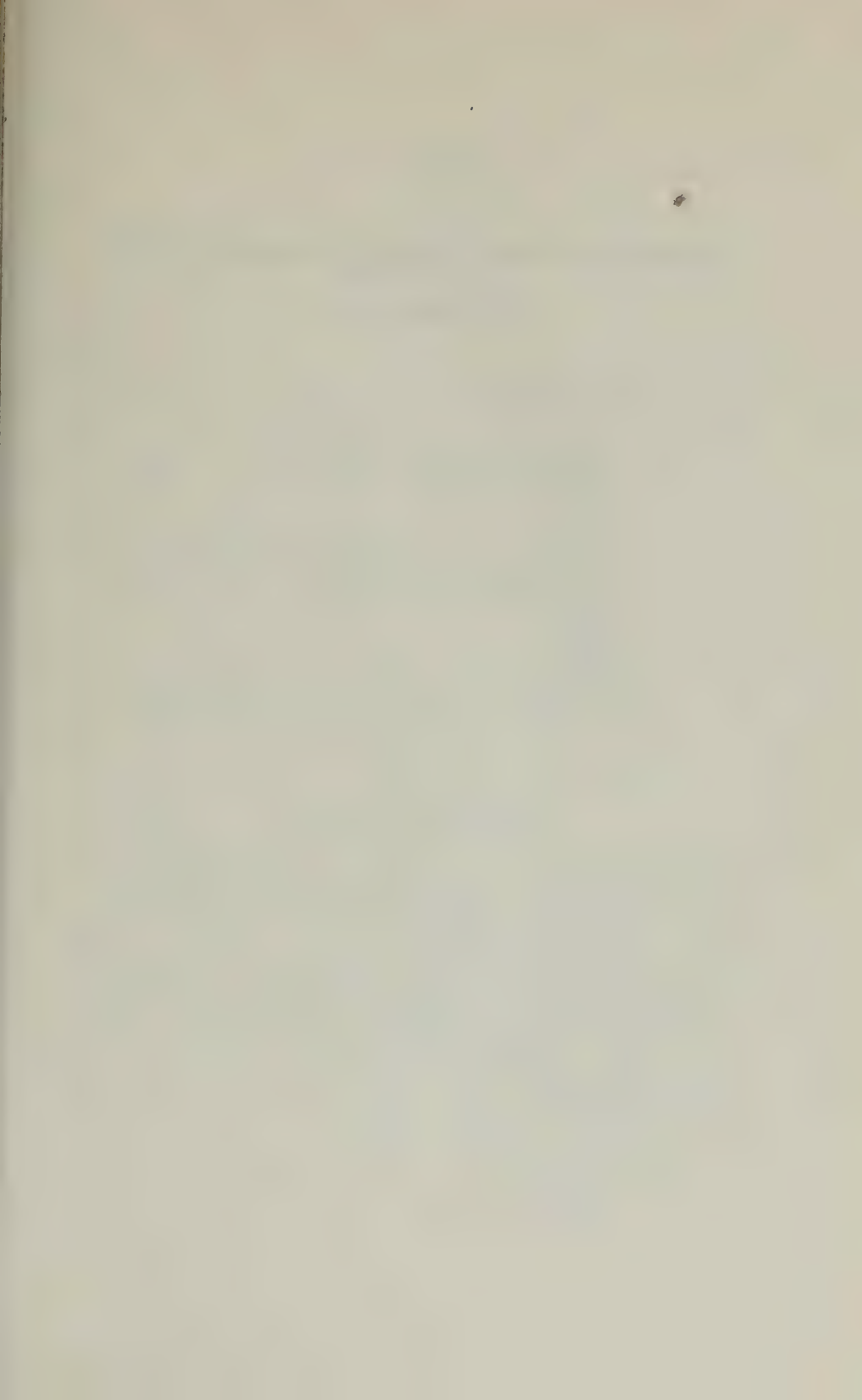
BRIEF FOR DEFENDANT IN ERROR.

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FLEMING & DAVIES,  
GARRET W. McENERNEY,  
*Attorneys for Defendant in Error.*

FILED  
1918  
U. S. DISTRICT COURT  
S. D. CALIF.





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**BRIEF FOR DEFENDANT IN ERROR.**

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I.

**Statement of Facts.**

The facts of the case are, for all practical purposes, undisputed. The Defendant in Error (hereinafter called the plaintiff) is an American citizen residing in Shanghai, China, and engaged in the shipping business there.<sup>1</sup> The Plaintiff in Error (hereinafter called the defendant) is a corporation organized under the laws of the State of California and having its principal place of business in San Francisco;<sup>2</sup> the defendant, therefore, is an American citizen. During all the times involved in the action the defendant was a common carrier of freight between the

1. R. pp. 2, 13.

2. R. pp. 2, 13.

Orient and San Francisco.<sup>3</sup> It had an agent in Shanghai, China, through which it solicited business.<sup>4</sup> The agent was a British corporation,<sup>5</sup> and it is about this circumstance that the main defense of the defendant turns. The defendant had chartered the American steamer "Yucatan",<sup>6</sup> and its agent in Shanghai had advertised in the public press of Shanghai between April 16, 1916, and May 5, 1916, that the "Yucatan" would be put on the berth at Shanghai, and that applications for freight space for a voyage to San Francisco would be entertained.<sup>7</sup> Prior to the arrival of the "Yucatan" at Shanghai the plaintiff applied to the agent of the defendant for freight space.<sup>8</sup> At first the agent *unconditionally* refused to allot any freight space to the plaintiff,<sup>9</sup> notwithstanding that there was at the time of plaintiff's application considerable freight space undisposed of so as to have permitted the acceptance of plaintiff's application had the defendant's agent been minded to accept it.<sup>10</sup> Later, however, the agent modified its refusal, and agreed to accept plaintiff's application and to provide freight space for him *upon condition that his application be passed by the British Consul at Shanghai*.<sup>11</sup> During all of this time the defendant's agent was accepting applications of other shippers without reservation or condition.<sup>12</sup> The plaintiff refused to recognize

3. R. pp. 4, 14.

4. R. pp. 3, 13.

5. R. pp. 3, 14, 15.

6. R. pp. 2, 13.

7. R. pp. 3, 13.

8. R. pp. 3, 13.

9. R. pp. 4, 14.

10. R. pp. 4, 14.

11. R. pp. 5, 14.

12. R. pp. 4, 14, 29.

the *conditional* acceptance of his application because as an American citizen dealing with an American charterer of an American vessel he believed the condition to be unlawful, and further because he knew, and *the agent knew*, that, for reasons presently to be mentioned, the British Consul would not approve his application.<sup>13</sup>

The plaintiff demanded an unconditional acceptance of his application, but the defendant, through its agent, refused to comply with such demand.<sup>14</sup>

The cargo offered for shipment by the plaintiff came into the plaintiff's possession from German subjects who were his clients.<sup>15</sup> It is alleged in the answer of the defendant<sup>16</sup> that the cargo was in fact *owned* by German subjects, but there is no proof of that fact. It is admitted by the plaintiff that the goods were delivered to him by German subjects, and that he received his instructions with respect thereto from German subjects,<sup>17</sup> but as to the ownership of the cargo the record is silent.

By orders in council and by rules, regulations and decrees of the British Government theretofore promulgated, all subjects of Great Britain had been inhibited from dealing with German subjects or their agents, or with the goods of German subjects.<sup>18</sup>

As we have previously noted there is nothing in the record to show that the cargo which was tendered for shipment was in fact the property of German subjects.

13. R. p. 29.

14. R. pp. 5, 14.

15. R. p. 16.

16. R. p. 15.

17. R. p. 16.

18. R. pp. 14, 16.

However, the plaintiff, prior to his application for freight space on the "Yucatan", had been placed upon a British blacklist composed of neutrals who did business with German subjects.<sup>19</sup> Because he was blacklisted all British subjects were forbidden by the aforesaid orders in council from doing business with the plaintiff, *and it was for this reason that the defendant's agent refused to accept the plaintiff's application for freight space.*

The defendant, through its British agent, having refused to accept his cargo, the plaintiff brought suit in the United States Court for China and recovered a judgment for \$2700,<sup>20</sup> from which judgment this writ of error is prosecuted. The writ of error raises two questions, both of which are questions of pure law. The one involves the jurisdiction of the trial court, the other, the merits of the action. The first contention of the defendant is that the trial court had no jurisdiction over the subject matter of the action inasmuch as its jurisdiction is limited to controversies between citizens of the United States *resident in China*, and does not extend to a controversy between citizens of the United States, one of whom is a non-resident of China, although engaged in business in China, and *therein represented by an agent*.<sup>21</sup> The defendant's second point is that the plaintiff is not entitled to recover because the defendant in its violation of its obligation as a common carrier acted only through a British agent, which was bound by the law of its sovereign to refuse the plaintiff's application.<sup>22</sup>

19. R. p. 17.

20. R. p. 36.

21. R. pp. 50, 51.

22. R. p. 51.



No point is made concerning the amount of damages, so that the case of the defendant is rested entirely upon the establishment of one or both of the two propositions just stated. These propositions, however, may be briefly disposed of.

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## II.

### Argument.

#### A. THE TRIAL COURT HAD JURISDICTION OF THE SUBJECT MATTER OF THE ACTION.

The defendant in the action appeared and litigated the various issues that were presented, and judgment went against it on the merits. While, therefore, counsel in their brief speak of a lack of jurisdiction of the *person* of the defendant, and while the demurrer interposed by the defendant in the trial court attempted to raise the same point, it is obvious that the trial court did not lack jurisdiction of the *person* of the defendant.

The defendant by appearing in the action and litigating the issues presented by the pleadings submitted its *person* to the jurisdiction of the court. The point that the defendant really urges is that the trial court had no jurisdiction of the *subject matter* of the action because the defendant, although an American citizen, was not a *resident of China*. It is the defendant's contention that the United States Court for China has jurisdiction only of controversies between American citizens *who reside in China* and that it has no jurisdiction where one of the parties does not reside in China,

although he has an agent residing in China. This point necessitates a consideration of the statute creating the United States Court for China. The statute creating that court vested it with exclusive jurisdiction in all cases where jurisdiction at the time of the creation of the court was vested in United States consuls and ministers under *existing law and treaties* between the United States and China.<sup>23</sup>

Section 4085 of the Revised Statutes provides that the jurisdiction of American consuls and ministers shall embrace

“all controversies between citizens of the United States or others provided for by such treaties respectively”.

The treaty with China having to do with consuls and their jurisdiction is the treaty of June 18, 1858.<sup>24</sup> Article XX of that treaty gives to the United States the right to appoint consuls in various parts of China. Article XXVII of the treaty deals particularly with the questions and controversies of which the consuls shall have jurisdiction. It reads as follows:

“Art. XXVII. All questions in regard to rights whether of property or person, arising between citizens of the United States *in China* shall be subject to the jurisdiction and regulated by the authorities of their own Government. And all controversies occurring *in China* between citizens of the United States and the subjects of any other Government, shall be regulated by the treaties existing between the United States and such Governments respectively without interference on the part of China.” (Italics ours.)

23. Act of June 30, 1906, c. 3934, 34 U. S. Stats. at L. 814; U. S. Com. Stats. 1916, Vol. 7, Sec. 7687, p. 8165.

24. 12 U. S. Stats. at L., p. 1029.

It is the defendant's contention that the words "in China" in the first sentence of Article XXVII qualify the word "citizens" and not the word "arising", so that the test of jurisdiction shall be that the parties litigant *reside in China* rather than that the controversy between them *has its origin in China*. Considering the purpose of the treaty, however, it is plain from Article XXVII and from other articles of the treaty that the controversies of which the American authorities were to have jurisdiction under the treaty were controversies *arising in China* between American citizens, irrespective of the residence of the parties litigant. It is plain that the phrase "in China" in the first sentence of Article XXVII qualifies the word "arising" and not the word "citizens". The whole article deals with *controversies arising in China*. The first sentence has to do with controversies between citizens of the United States. The second sentence deals with controversies in which one of the parties is a citizen of the United States and the other the subject of another government. The bare reading of the second sentence is all that is necessary to show that the words "in China" appearing therein fix the place of the origin of the controversy, and not the residence of the parties to the controversy. There being no reason why a different construction should be given to the first sentence, it seems equally clear that the words in the first sentence should likewise be held to fix the place of origin of the controversy rather than the residence of the parties to the controversy. Otherwise a consular court in China would be vested with jurisdiction of a controversy between American citizens *arising in the United States* by the fortuitous circum-

stance that both parties to the controversy might at the time of suit be "in China". This result shows the absurdity of defendant's construction of the treaty provision, an absurdity which becomes even more apparent from a consideration of other provisions of the treaty. Before passing to a consideration of other provisions of the treaty however, it should be noted that the defendant, in strictness, was *in China* at the time that the controversy arose because it was doing business there through its agent and was present by its agent. The controversy between the plaintiff and the defendant was in strictness therefore a controversy arising in China between two American citizens *in China*, the one personally, the other through its representative.

In Article XI of the treaty it is provided that:

"All citizens of the United States of America *in China*  
 \* \* \* shall receive and enjoy for themselves and everything pertaining to them the protection of the local authorities of Government, who shall defend them from all insult or injury of any sort. If their dwellings or property be threatened or attacked by mobs or incendiaries, or other violent or lawless persons, the local officers on requisition of the consul, shall immediately despatch a military force to disperse the rioters, etc."

It will be noted that this article deals with the rights (in respect of person and property) of "citizens of the United States of America *in China*". Would it be contended that this article of the treaty afforded protection only to the property of American citizens *residing in China*, and gave no security on the part of the Chinese government for the safeguarding of the property of American citizens who engage in business in China



through agents. Is it not clear that the purpose of the article was to protect property *situated in China*, belonging to citizens of the United States, whether the citizens resided in China or not? So also was it not the purpose of Article XXVII of the treaty to provide for jurisdiction of all controversies *arising in China* to which an American citizen was a party?

We submit that the various provisions of the treaty make it clear that it was the purpose to protect *property in China* owned by American citizens, without respect to where those citizens resided, and to invest American consuls with jurisdiction of all *controversies arising in China* between American citizens without reference to the place where those citizens resided. We submit further that even were it necessary for an American citizen to be "in China" in order to entitle him to invoke the provisions of the treaty for the protection of his property and the jurisdiction of his controversies, he is "in China" within the meaning of the treaty *when- ever he engages in business in China through an agent who resides in China*. The presence of the agent *in China* will be the equivalent of his principal's presence there for all the purposes contemplated by the treaty.

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**B. THE FACT THAT THE AGENT OF THE DEFENDANT WAS A BRITISH SUBJECT, FORBIDDEN BY BRITISH RULES AND REGULATIONS AND ORDERS IN COUNCIL FROM DEALING WITH THE PLAINTIFF, IS NO DEFENSE TO THE ACTION.**

It is the general rule, well understood and requiring no citation of authority to support it, that a common

carrier, such as the defendant admittedly is, is under obligation to carry the goods of any member of the public who may tender goods for carriage. It is conceded that to this rule there are certain exceptions in favor of the carrier. It may be shown that the carrier was prevented by act of God or a public enemy, or *by some other cause over which it had no control*, from complying with its common law obligation. Any excuse which the carrier has for failing or refusing to comply with its obligation of carriage is *an affirmative defense in proving which the burden of proof is always upon the carrier*. This principle is as well established as the principle that a common carrier is ordinarily obligated to carry all goods that may be tendered to it.

“If any reason exists excusing a carrier from receiving freight for shipment or for refusing to furnish cars to a shipper, they are matters of defense to be pleaded by the defendant and not the plaintiff.”

*1 Michie on Carriers*, Sec. 381, p. 260.

“In an action against a carrier for failure to furnish cars after demand, an answer failing to allege facts showing that the carrier did perform its duty of providing a sufficient number of cars to meet the ordinary needs of its business, which it could reasonably anticipate, or that the scarcity of cars and existing demands for them *were the result of circumstances beyond its power reasonably to control and provide against, is demurrable.*”

*1 Michie on Carriers*, Sec. 381, p. 261.

See, also:

*Chicago Etc. R. Co. v. Wolcott*, (1895) 141 Ind. 267, 39 N. E. 451.

This was an action against a carrier for failure to provide a shipper with transportation on demand by

him. The defendant contended that the complaint was insufficient because it did not show that no inability on the part of the defendant existed at the time of plaintiff's demand. The court, however, held that this was a matter of affirmative defense, and said (p. 453):

“If the company were in fact unable to furnish the required cars without undue interference with its business, or with the rights of shippers at other points, that should be shown by the company. The company held itself out to the appellee and the public generally as a common carrier to the several markets named. The complaint alleges that there was no competition against appellant at the shipping points of appellee, and that appellant discriminated against appellee by refusing him cars, and at the same time furnishing cars to others doing business at competing points. We think the allegations of the complaint were quite sufficient on this point; and, if there were any reason why appellant could not furnish cars when demanded, appellant should aver the same by way of answer. *Appellant knew the conditions of its own business much better than appellee could know them.*”

It remains to be seen whether the defendant in the present case has brought itself by *pleading and proof* within these rules, in short whether the defense interposed by the defendant measures up to the requirements of the law. We submit that it does not for two reasons:

1. The tort of the defendant, through its agent, *was not beyond the power of the defendant to control or guard against*; and
2. No act of the British Government could justify the defendant's tort in refusing to accept the plaintiff's goods.

We will discuss these two propositions in the order in which we have stated them.

- (1) The tort of the defendant, through its agent, was not beyond the power of the defendant to control or guard against.

To excuse itself from its common law obligation to carry freight the carrier must show that its failure or refusal was due to causes *beyond its power to control*. In the present case it was the duty of the defendant to receive the freight of all persons impartially. The defendant, in order to carry out its common law obligation, was compelled to have an agent who would be under no disability with respect to compliance with the defendant's obligation. The defendant could not employ an agent bound by British law to disregard a right of the plaintiff, and then set up the agent's incapacity as a defense to an action by the plaintiff to redress the violation of the latter's right. If we assume for the moment that a mandate of the British Government operating upon the agent of an American citizen could justify the American citizen in violating its duty toward another American citizen, such only would be the case where the disability of the agent was either (a) unknown to its principal at the time of the agent's tortious act; or (b) had been learned by the principal too late to have permitted a change of the agent.

Neither of these elements is present in the case at bar. *The defendant did not plead, nor did it attempt to prove that it was ignorant of the agent's disability which it urges as a defense.* For all that the record shows the defendant knew of the disability of its British agent, and retained the agent with knowledge of its disability. It should be borne in mind that on the defense which it set up *the defendant had the burden of proof.* It was



not for the plaintiff to show that the defendant had knowledge of the disability of its agent. If lack of knowledge on the part of the defendant entered into the defendant's defense, it was incumbent upon the defendant to plead and prove such lack of knowledge. The defense upon which it relied was an affirmative defense as to which it had the burden of proof, and if, as argued by counsel for the defendant,<sup>25</sup> there is no evidence in the record to show whether or not the defendant had knowledge of the disability of its agent, the defendant must be the sufferer, because thereby it has failed to sustain the burden of proof which the law cast upon it with respect of its affirmative defense.

The bill of exceptions in the record *does not contain any of the evidence introduced on the trial*. We may therefore invoke the rule that every presumption is in favor of a judgment, and that a party attacking a judgment must *affirmatively* show that it is erroneous.<sup>26</sup> In the absence of a bill of exceptions containing the evidence received upon the trial, it will be conclusively presumed that evidence was received which justified the judgment.<sup>27</sup> The plaintiff in error cannot claim that there was no evidence that it had knowledge of its agent's incapacity when *the record upon which it relies does not contain any of the evidence received upon the trial*. In such a case it will be conclusively presumed

25. Br. of Pl. in Er., p. 13.

26. *Williamson v. Richardson*, (1913) 205 Fed. 245 (C. C. A., 9th C.).

27. *Lew Moy v. U. S.*, (1908) 164 Fed. 322 (C. C. A., 9th C.); *Pennsylvania R. Co. v. Glas*, (1917) 239 Fed. 256 (C. C. A., 3d C.); *Vera Cruz & P. R. Co. v. Waddell*, (1907) 155 Fed. 401 (C. C. A., 4th C.); *Nashua Savings Bank v. Anglo-American Co.*, (1901) 108 Fed. 764 (C. C. A., 1st C.), affirmed 189 U. S. 221, 47 L. ed. 732.

in favor of the judgment that evidence sufficient to justify the judgment was received upon the trial.

- (a) **The defendant had knowledge of its agent's disability, and with such knowledge continued its agency. It cannot therefore rely upon the agent's incapacity.**

As we have already stated, the burden of proof was upon the defendant to show its lack of knowledge of the disability of its agent, if it would defeat the plaintiff's claim. Nevertheless, the result would not be otherwise if the burden of proving the defendant's knowledge of its agent's disability were upon the plaintiff.

It is an elementary principle of law, that, in favor of third parties, an agent will be conclusively presumed to have communicated to his principal all matters affecting his agency which have come to his knowledge. Counsel for the defendant admit this principle, but seek to bring the facts of this case within an exception to the principle which may be said to be as well-defined as the principle itself. They argue that, under the facts appearing, the interest of the agent was adverse to that of the defendant, and therefore no presumption arises that the agent communicated the fact of its disability to the defendant. Of course it is essential to the application of the principle that it be shown that there was an adverse interest between the defendant and its agent. This adverse interest, counsel say, arises from the fact that notice of the agent's disability, if communicated to the defendant, might or would have resulted in a termination of the agency and the cutting off of the agent's emoluments. Counsel however overlook the fact that

the agent in all of its transactions with the plaintiff was representing its principal. *The agent was the only person with whom the plaintiff had any direct dealings*, and since in its transactions with the plaintiff the agent represented the defendant, all knowledge which the agent had which affected the transaction with the plaintiff or the subject-matter of the agency will be presumed in favor of the plaintiff to have been communicated to the defendant, *even though the agent's interests might have suffered from such communication*. Whenever an agent represents his principal in a transaction,

“even though he may have an opposing personal interest, it is his duty, notwithstanding his interest, to communicate to his company (principal) any facts in his possession, material to the transaction, and the law will therefore presume, in favor of third persons, that he made such communication.”

*McKenney v. Ellsworth*, (1913) 165 Cal. 326, 329, quoting from *Pittsburg v. Whitehead*, 36 Am. Dec. 186.

Applying this principle, which is well-established, it will be presumed that when the plaintiff applied to the defendant's agent at Shanghai for freight space on the “Yucatan”, the agent, knowing its disability, advised the defendant of the application and of its disability. It then became incumbent upon the defendant, inasmuch as its agent was forbidden to deal with the plaintiff, to appoint another agent or to deal with the plaintiff directly by cable. The plaintiff's first application for freight space was made on May 3d, and

was refused by the defendant's agent.<sup>28</sup> On May 5th a second application was made and was again refused.<sup>29</sup> It was not until May 8th, five days after the plaintiff's first application, that the agent accepted the application, *conditioned upon the approval of the British consul*.<sup>30</sup> It is clear, therefore, that for five days the defendant had it within its power, knowing of the disability of its agent, (because it will be conclusively presumed in favor of the plaintiff that the agent communicated the fact of the plaintiff's application and of its own disability to act upon the application) to appoint another agent not under disability or to deal directly with the plaintiff by cable, and to accept his application for freight space, as by law it was obligated to do. When it failed to do this it directly made a breach of its obligation to carry plaintiff's tendered cargo. It cannot, therefore, defend against the plaintiff's action by imputing the refusal to carry to its agent, when under the law it will be conclusively presumed to have known for five days of its agent's action, and therefore to have ratified such action.

The defendant's claim in the present case is not unlike one advanced by the defendant in *Missouri Etc. Ry. Co. v. Raney*, (1907) 44 Tex. Civ. App. 517; 99 S. W. 589.

The plaintiff in the case cited contracted smallpox, through contact with a ticket agent of the defendant, and sued the defendant for the damage caused thereby.

28. R. pp. 4, 14.

29. R. pp. 4, 14.

30. R. pp. 4, 5, 14.



The defense urged was that the defendant was not liable because there was no *direct* proof that it had knowledge of its agent's condition and knowledge of such condition would not be imputed to it. The court, however, held against this contention, saying in this behalf (p. 590):

"In our opinion Bridges, at the time appellee was exposed to him, being the ticket agent of appellant and in the discharge of his duties incumbent on him as such agent, and appellee being present for the purpose of transacting business with him in the line of his duties to appellant, and the said Bridges at the time having the contagious disease of smallpox, and knowing that he had it, his knowledge became that of his principal, the railroad company. \* \* \*"

(p. 591):

"Appellant having notice through its agent, at and prior to the time appellee was exposed to him, that he had the contagious disease of smallpox, and said agent having communicated said disease to appellee and his wife, appellant is liable to appellee for the damages sustained by him as the direct and proximate results of such wrongful act of its agent. The appellant, under the common law, owed to the individuals composing the public who dealt with it the duty to keep them from having contagious diseases communicated to them by its agent while they were dealing with it through such agent."

While it was not claimed in the case that the interest of the ticket agent was adverse to that of the railroad company because he would have lost his position if he communicated the fact of his disease, such a claim would have had as much merit under the facts of the case, as the claim of the defendant in the present case.

- (2) No act of the British Government could justify the defendant's tort in refusing to accept the plaintiff's goods.

What we have already said is sufficient to dispose of the case. We have already shown that the defendant has failed in the measure of proof sufficient under any view of the case to make out a defense. *It has failed to show that the incapacity of its agent upon which it relies was not one known to it and suffered by it to continue to the detriment of the plaintiff.* As we have already shown, the plaintiff could not appoint an agent whose legal disability would prevent it from impartially discharging the defendant's obligations to the public, or continue the employment of such an agent with knowledge of its disability, and then interpose the fact of the disability as a defense to an action brought for a tort committed through the agent. The defendant could not through indirection accomplish what the law would not permit it to do directly.

In a larger view of the case, however, the defense of the defendant is insufficient in law. If the defendant had pleaded and proved that it had no knowledge of its agent's disability in time to have permitted it to procure another agent, or directly to accept the plaintiff's application, the plaintiff would nevertheless be entitled to recover upon the broad ground that *no disability of the defendant's agent arising from a law or regulation of a foreign sovereign would be a defense against a breach of the defendant's obligation.* The defendant is a corporation engaged in business as a common carrier. Necessarily it can act only through its agents. It is obli-

gated under the law to deal impartially with all members of the shipping public. In order so to do it is necessary that the defendant have as its agent a person capable of acting impartially. Just as a common carrier is "under a legal obligation arising out of the nature of its employment to provide suitable and necessary means and facilities for receiving"<sup>31</sup> goods offered it for shipment over its road, so also it is obligated to have, representing it in its business, persons who are qualified to impartially do its business. The agent through whom the carrier does its business is, to a certain extent, one of the "facilities" of the carrier in the conduct of its business. The defendant in this case was an American citizen, obligated by American law to carry the goods of the plaintiff when offered to it. The fact (if it be the fact) that the goods offered by the plaintiff belonged to German clients of the plaintiff was utterly immaterial. At the time of the transaction in question the United States was preserving toward Germany a status of strict neutrality, and the defendant could not, without violating the letter and spirit of the neutrality of the United States, refuse to accept goods offered to it for shipment by an American citizen, even though those goods were the goods of German subjects. Nay, it could not, without violating the letter and spirit of American neutrality, have refused to accept the goods of German subjects, if offered to it for shipment by the owners themselves.

In fulfilling its obligation to carry, the defendant was required by law to have as its agent a person who was

31. *Covington Stockyards Co. v. Keith*, (1890) 139 U. S. 128, 133; 35 L. ed. 73, 75.

under no legal disability that would prevent him from impartially discharging his principal's obligations. This being so it matters not whether or not the defendant had notice of its agent's disability. If the disability of the defendant's agent existed without the knowledge of the defendant and without any opportunity on the defendant's part to secure an agent not laboring under disability, that fact, while it would relieve the defendant of the stigma of having *wilfully* violated its obligation and the neutrality of its country, would not relieve it from liability to the plaintiff for all the damages which he had suffered from the defendant's default. The fact of the defendant's ignorance, while it would render the defendant guiltless of *intentional* wrongdoing, would do no more than put it upon a parity of innocence with the defendant, and enable the latter to invoke the salutary principle that where one of two innocent persons must suffer from the act of a third person, he must bear the loss who put it in the power of the third person to commit the act which caused the loss. Paraphrasing this principle: where a principal and a third person are equally innocent, and a loss is caused by the act of the principal's agent, the principal, and not the third person, must suffer the loss caused by the agent's act. Directly in point upon this proposition is

*Chesapeake & O. Ry. Co. v. Francisco*, (1912) 149 Ky. 307; 148 S. W. 46.

A conductor had committed an assault upon a passenger. The passenger sued for damages. The Railroad Company defended upon the ground that at the time of the assault the conductor was insane, *and that*



*it was unaware of that fact.* Upon the submission of the case to the jury the defendant requested the following instruction (p. 47):

“If the jury believe from the evidence at the time of the utterance of the abusive words set out in the petition to the plaintiff by Jack O. Johnson, conductor of defendant’s train was so far demented or of unsound mind, as not to know the extent of his acts, and the defendant company could not by the exercise of reasonable diligence have discovered his mental condition before the alleged abusive language, then the jury will find for the defendant company.”

The trial court refused to instruct as requested, and the plaintiff recovered judgment. Thereupon the defendant appealed, urging that the trial court committed error in refusing the instruction. It will be noted that the defense presented by the railroad company and embodied in the instruction requested by it and refused by the trial court was in principle precisely the same as that of the defendant in the present case. The railroad company claimed that its conductor, through insanity, was under legal disability, and that it could not be liable for a tort committed by him unless it had knowledge of his disability in time to have removed him and employed another conductor. In the case at bar the defendant claims that its agent was acting under a disability created by British law, and that it did not know (or rather that there is no evidence to show that it did know) of the disability in time to employ an agent not laboring under disability. In disposing of the railroad company’s contention in the case cited, the court, after pointing out that an insane person is personally liable in compensatory damages for his torts,

upon the principle that where one of two innocent persons must bear a loss, he must bear it who caused the loss, says (page 48):

“We perceive no good reason why the master should not be held liable for the tort of an insane servant while acting within the scope of his employment, and engaged in attending to the master’s business. Though the person injured and the master may both be innocent, yet it is the master’s servant who causes the injury, and therefore the master should bear the loss.

Besides, in case of passengers injured by the negligence or tort of one of its employes, a railroad company may not escape liability because it used ordinary care in hiring competent employes. It matters not what degree of care the railroad company may have exercised in this respect; it is still liable for the negligent or tortious act of such employe while acting within the scope of his employment. *Ignorance of an employe’s incompetency does not excuse it.* When acting through a conductor as its agent, it is liable for an injury inflicted by him upon a passenger, whether such injury be the result of negligence, willfulness, or unsoundness of mind, and without regard to its inability to discover, by the exercise of reasonable diligence, that his conduct and habits, or his mental capacity, were such as to induce a reasonable belief that such acts would follow.”

All of the matter quoted is directly responsive to the defense urged in the present case, and disposes of that defense. The defendant, which acted only through agents, could satisfy its obligation to the public only by the employment of agents who are not laboring under disability; if by reason of any disability under which an agent acted, a wrong was inflicted upon the plaintiff, the defendant cannot impose the consequences of that wrong upon the plaintiff, but must itself bear them, *because the wrong was committed by its own agent.*

- (a) In no event can the defendant justify the act of its agent by showing that such act was required by a British law, order or regulation.

As we stated at the outset of this brief, the obligation of a common carrier to carry goods is not absolute. There are certain matters which may excuse a carrier from its obligation to carry. Acts of God, or public enemies, and causes beyond the power of the carrier to control or guard against, may be urged as excuses. The fact that the carrier was prevented by the law of its own country or by war existing in its own country, or in which its own country was a belligerent will excuse the carrier. *Not so, however, with a war to which the carrier's country is not a party.* No foreign war can excuse the carrier's obligations. An alleged impossibility of performance arising from a foreign war is never regarded as sufficient. In *Richards & Co. v. Wreschner*, (1915) 156 N. Y. Supp. 1054 (p. 1057) it is said:

"The claim of the defendants that they are excused from performance because of the interference with the source of supply or with the opportunity for shipment by reason of the existence of a state of war between Germany and Belgium, and also because of the subsequent illegality of shipment by reason of the proclamation of the German government prohibiting the exportation of the merchandise contracted for, cannot be sustained.

It is well settled that impossibility due to a foreign war is no excuse" (citing numerous cases).

In *Tweedie Trading Co. v. McDonald Co.*, (1902) 114 Fed. 985 (District Court S. D. New York) the court, while recognizing that an impossibility of performance "arising from a governmental act which would render performance illegal, would be an excuse", held that *the*

*rule did not contemplate acts of a foreign government, and that no governmental act of a foreign government would excuse performance.*

In the present case the defendant was an American citizen chartering an American vessel, and was obligated by law to carry the goods of every American who should tender goods for shipment. Not only that, but the defendant could not, without violating the letter and spirit of American neutrality, refuse to carry the goods of German subjects. Having, in violation of its obligation under American law, refused through its agent to carry the goods tendered to it for carriage by an American citizen, it cannot justify or excuse the violation of its duty by showing that a British law, order or regulation made performance of this duty illegal. The defendant was an American citizen; no British law, order or regulation could affect it in any wise, much less justify it in refusing to fulfill its obligation created by American law.

In fact, a common carrier can never rely upon a *disability of its own agent* to justify a violation of a legal obligation. Causes extraneous to itself may excuse a carrier, but not acts emanating from itself, to wit, a disability of its own agent. This is the rule laid down in

*Chesapeake etc. Ry. Co. v. Francisco* (1912),  
149 Ky. 307; 148 S. W. 46,

to which we referred on page 20, *supra*, and it is the main ground upon which the trial court in the present case, in a well-reasoned opinion, held the defendant's defense to be insufficient. The opinion of Judge Lobingier on the merits of this case appears in full in the



Record at pages 18 et seq. and merits careful consideration. We subscribe fully to the views of the learned judge therein expressed.

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### III.

#### **Conclusion.**

In view of the foregoing we respectfully submit that the judgment should be affirmed.

Dated, San Francisco,

February 23, 1918.

FLEMING & DAVIES,

GARRET W. McENERNEY,

*Attorneys for Defendant in Error.*



**United States Circuit Court  
of Appeals  
For the Ninth Circuit**

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JOHN W. ROBERTS,

*Plaintiff in Error,*

*vs.*

THE UNITED STATES OF  
AMERICA,

*Defendant in Error.*

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UPON WRIT OF ERROR TO THE UNITED  
STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF WASHING-  
TON, NORTHERN DIVISION.

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**Brief of Defendant in Error**

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CLAY ALLEN,

Attorney for Defendant in Error

310 Federal Building,

Seattle, Washington.

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FILED  
JUN 10 1917





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**STATEMENT OF THE CASE.**

The record will disclose that one Clifford Yarborough in 1898 or 1899 in the State of Tennessee sustained illicit relations with an octoroon negress who bore him a baby daughter born out of wedlock, who was named Eugenia. After some few years,

Yarborough openly acknowledged her as his daughter, caused her to adopt his name, sent her to school, and in 1915 or early in 1916 tried to adopt her as his daughter under the laws of Indiana. In March, 1916, he, accompanied by his daughter who was then about seventeen years old, journeyed from Indiana to Seattle, Washington, where he arrived on February 28th, 1916. Unacquainted with the city, he procured lodgings for himself and daughter at a house on Jackson Street. He engaged but one room with a small anteroom as a kitchen, and commenced to occupy these quarters with his daughter Eugenia. While a bed and separate cot were provided for them, they were compelled to and did use one room for about one week, when they moved to a more pretentious part of the city and engaged two rooms.

Yarborough brought with him in gold and currency seven thousand five hundred dollars in addition to some small bills for traveling expenses, which he deposited in the Dexter Horton Bank in Seattle on the day of his arrival. The second day after arrival, Yarborough picked up a chance acquaintance with a man by name of Moore, to whom

he incautiously revealed the fact that he had brought with him seven thousand five hundred dollars which he then had on deposit with the Dexter Horton Bank intimating during his conversation with Moore, that he would like to invest this sum after getting acquainted with local conditions. Moore later in the day told one Lonergan what he had learned about Yarborough. Moore had also learned of Eugenia through her father. Lonergan then, with full information about Yarborough and daughter, sought out his place of residence, and interviewed the landlady in whose house Yarborough was lodging. Lonergan after several days introduced Moore to defendant Coyne, and during a walk from the Busch Hotel down King Street, Coyne made certain statements to Moore and Lonergan, the substance of which was that some plan should be formulated whereby Yarborough might be swindled out of his money. (See pages 22-23 of Bill of Exceptions in lower court. I haven't the page number of the appellate record.)

After Yarborough had moved from Jackson Street, defendant, John W. Roberts, who was spoken of in the conversation between Moore, Lon-

ergan and Coyne, went out to the Jackson Street house where Yarborough had spent his first week in Seattle, and interviewed Mrs. Burke, the landlady or proprietress. She disclosed her suspicions to Roberts, intimating that improper relations were being sustained between Yarborough and the girl Eugenia.

After the interview between Coyne, Moore and Lonergan during the walk from the Busch Hotel, Lonergan and Moore went out to Yarborough's new lodgings. This visit took place on the afternoon of the 11th of March, 1916. Yarborough not being at home, they left his place of residence immediately.

From this point in the narrative of crime, Moore and Lonergan drop out. Coyne entered the scheme of things some few days earlier when the meeting between Coyne, Moore and Lonergan took place at the Busch Hotel, which was followed by the walk down Jackson Street, and the swindling plans suggested and elaborated on by Coyne to his companions.

There was some evidence of mysterious persons calling at Mrs. Burke's Jackson Street house, and repeated reference by her to a short, thickset dark



man whose identity is unknown. Moore and Lonergan visited Mrs. Burke's house in company and at separate times. They were quite active in eliciting all the information obtainable about Yarborough, and Mrs. Burke was equally free in voicing her suspicions concerning them.

From this Saturday afternoon, after their visit to Yarborough's new lodgings, they have nothing further to do with the case. From thence on, Coyne, Roberts and Nick Collins are the sole actors in the scheme of crime. Whether Moore and Lonergan were co-conspirators, who took advantage of the *locus poenitentiae* or not, is still an open question, except as it has been determined by the Grand Jury. A very careful consideration leaves counsel for the prosecution still in doubt as to whether Lonergan actually participated in the criminal operations of Coyne and Roberts. Moore strenuously denied any guilt or guilty knowledge in the premises, both in the Grand Jury room, and during his examination in the trial of the case. Lonergan never appeared after Saturday afternoon, March 11th. His whereabouts were never traced, and his participation in the scheme never known. An

inference might be indulged in that Lonergan and Coyne with some other unknown man visited Mrs. Burke's Jackson Street house to learn what they could of Yarborough. Mrs. Burke was not able to identify them, nor could she give any description of these men which would place Coyne and Lonergan in the conspiracy in its formative stages. Certain it is that Coyne and Lonergan were friends, and that Coyne got his information about Yarborough through Lonergan. Counsel for the prosecution during the preliminary investigation of the facts and from what the grand jury inquiry developed, was in doubt as to just what Lonergan had done in the early stages of what afterwards developed into the criminal conspiracy charged in the indictment. Lonergan never appeared before the Grand Jury. Trial preparation developed somewhat more fully the fact that Lonergan had something to do with the early plans of Coyne, and yet when the testimony was all taken, counsel were in greater doubt than ever as to just what the connection was between Roberts and Coyne, who clearly conspired and acted concertedly, and Lonergan and some third person of whom there is mention in

Mrs. Burke's testimony.

From the Saturday afternoon, March 11th, up to the consummation of the crime as charged in the indictment, which terminated when Yarborough was swindled out of his two thousand dollars and sent to Vancouver under guard, while his daughter was shipped East, the story is easily told. Nothing is left to conjecture or speculation in the narrative.

Roberts and Coyne went to Yarborough's Twelfth Avenue apartments, represented themselves as government officers, made arrangements for taxi cab to take him and his daughter to the Perry Hotel. Coyne went with father and daughter to the hotel, procured rooms for them, remained on guard in their apartment all night, kept them under surveillance during Sunday, until Roberts relieved him in his guard duty, and then went to prepare the way for Nick Collins to enter the conspiracy. Coyne then returned to the hotel, kept father and daughter under arrest, remained with them during Monday, and finally with Roberts persuaded Yarborough to give them two thousand dollars. Full details of what Roberts and Coyne said as to being government officers to Yarborough and daughter,

full details as to drawing the moneys from bank, of sending five hundred of it to an Eastern Bank to Eugenia's order for her support, two thousand to Coyne and Roberts, the trip to the depot, the trip to Vancouver wherein Yarborough was under guard by defendant Coyne and Nick Collins, all were told with an accuracy and corroboration which left no doubt in the minds of the jury or court as to Robert's guilt. Counsel's opening statement for the prosecution gives in circumstantial detail the whole criminal story.

### ARGUMENT.

#### THE INDICTMENT:

Error is predicated upon the court's action in overruling demurrer and denying motion in arrest.

In order to better understand the indictment, we will make an analysis of it so that the court can see at a glance the part that each count played in charging the crime outlined in the opening statement in the record, as well as in this brief.

Counts one and two charged a conspiracy under Section 145 of the Penal Code. They were identical except that in one it was alleged that the defendants threatened to inform against Yarborough for an



*alleged* violation of a law of the United States, while in two the threat was made for a violation of a law of the United States by Yarborough. Count one treating the threat against Yarborough for an alleged violation of law of the United States was dismissed, and the cause went to the jury under count two and others. This conspiracy count was similar in its brevity and statement of its object to the indictments in the *Dahl* case, *Ding* case, and many other adjudicated federal appellate cases. It followed the language of the statute in stating the object of the conspiracy, and then followed with overt acts.

Count eight was also a conspiracy count under section thirty-two of the Penal Code. Here it followed the language of the statute. Although P. C. 32 includes two offenses—viz., pretending to be an officer and taking upon oneself to act as such; and assuming and pretending to be an officer, and demanding or obtaining money under such pretended character—yet the conspiracy was single—*John Gund Brewing Company vs. United States*, 207 Fed., and many other decided cases. The same overt acts of count two were set forth in count

eight, the only difference being count two follows language of P. C. 145 in stating object of conspiracy, and count eight follows language of P. C. 32 in stating its object.

This disposes of the conspiracy counts two and eight.

Counts three and five relate to the same offense stated in different language, as to counts six and seven. Four was dismissed. To understand these four counts, viz., three and five and six and seven, we must look to Penal Code Section thirty-two. This statute states two offenses, one, that of pretending to be a government officer, and assuming and taking it on oneself to act as such, the second, that of assuming and pretending to be a government officer, and in such pretended capacity demanding and obtaining money.

They cover two lines or phaze of the fraudulent personation of a government officer, which Congress saw fit to make a felony. In the one, the offender fraudulently impersonates a government officer, and makes an arrest, or does some other act under the pretense that he is doing an official act. In the other, he makes the same fraudulent representation,

and by virtue of it obtains money. All other impersonations fall short of an offense. Falsely pretending to be a secret service man, and strutting about in society as such to satisfy a personal vanity or to enjoy a temporary admiration or distinction from ones associates, is not within the scope of P. C. 32. It is only when the pretender assumes the functions of a federal officer, or demands or obtains money while in the pretended character of a government officer, that he commits the offense provided for in Section Thirty-two.

Having in mind these two offenses, the court will see by inspection that counts three and five are intended to cover the first offense under Section thirty-two, viz., that of making the false representation and in the false and pretended capacity, acting as a government officer. The first of the counts (Count III) charges that defendant Roberts jointly with Coyne assumed and pretended to act as special agents of the Department of Justice then and there charged with the duty of enforcing the White Slave Traffic Act, whereas the second of these counts (Count V) charges that the defendants Roberts and Coyne jointly represented themselves

as officers of the United States authorized to make arrests in criminal cases.

Counts five and six cover the second offense under Section thirty-two, viz., that of making the false representation that they were government officers, and of obtaining two thousand dollars in their pretended capacity. Three and five cover their conduct in placing Yarborough under arrest, and acting as government officers, interrogating them as to their journey from East; keeping them under arrest, et cetera; while five and six cover the defendants' conduct in procuring two thousand dollars from Yarborough. The statement of the case, amply borne out by the record, shows that the two offenses under Section thirty-two were committed.

With this understanding we may say that counts three and five cover one offense stated in different terms.

The only thing left to the pleader was to make a count which would adequately cover the proof as to the kind of officer defendants represented themselves to be. The preliminary proof left the pleader in doubt as to just what the proof would show. It was clear that they had assumed the combined functions



of a deputy marshal and a special agent of the Department of Justice, charged with the duty of enforcing the White Slave Traffic Act. It was thought best in the draft of the indictment to cover both aspects of the representations and pretended acts under same, by stating specifically in separate counts the impersonation of a special agent of the Department of Justice charged with enforcement of White Slave Traffic Act, and the impersonation of an officer of the United States authorized to make arrests in criminal cases. It will be noted further that this count refers to officers generally, carefully avoiding the term "Deputy Marshal," who in fact at that time was the only authorized arresting officer of the United States.

One set of counts refers to the specific office of special agent—the other set to an officer in general terms charged with authority to make arrests in criminal cases. Observing this difference in describing the officer impersonated, counts three and five state the first offense under Section thirty-two, while five and six in different terms with respect to the officers impersonated cover the second offense, namely, demanding and receiving two thousand dol-

lars from Clifford Yarborough.

With the situation thus explained, we have two conspiracy counts with the same set of overt acts common to each, one to violate Section 145, the other to violate Section 32. We have in addition to the conspiracies, four counts charging the commission of two distinct offenses under Section 32. All four charge the consummated offense named. The jury returned a verdict of guilty on each count, and sentence generally was imposed under the verdict to run concurrently on all counts. Satisfactory proof in a record free from error on any one of these counts would sustain the verdict and judgment which follows it.

If conspiracy under Section 145 was not sufficient because Yarborough had not committed an offense, yet there remains the conspiracy in count eight to violate Section 32. If the conspiracy counts are inadequately covered by proof, there remains four counts charging the consummated offense.

If counsel is critical about count three in that proof showed Roberts to have made statements about the Mann Act and its enforcement, without any specific statement that he or they were special

agents, there is still ample proof that they pretended to be arresting officers of the United States. If there were any doubt as to which one of the defendants got Yarborough's two thousand dollars, (it apparently is Roberts' contention that Coyne got the money and spent it in company with Collins during a trip to El Paso in company with two women), the verdict must be sustained under the counts charging the assuming to act as government officers, for there was evidence of an overwhelming character showing the false arrest, the keeping under arrest, the act of Roberts in interrogating Mrs. Burke, and later in the day and during Sunday and Monday, the same conduct with respect to Yarborough and daughter.

A careful appreciation of the very complete manner in which the indictment in its various aspects covers and ties into the proof is a complete answer to the several points raised by counsel for the plaintiff in error for a finding of guilt on any one of the several counts, will sustain the verdict. This is so well established by the authorities that the statement of the proposition proves itself.

The argument relating to the unknown con-

spirators has no place in the four counts charging the consummated offense, for in these no others were mentioned.

The argument based on duplicity must likewise fall after careful inspection, first, of the two offenses under Section thirty-two, and then an examination of the pleading, which shows that in counts three and five, one offense is pleaded in different ways, and under five and six another and distinct offense is pleaded in different ways. One distinct offense, however, is stated in each one of the four consummated offense counts, and but one conspiracy is charged in each of the conspiracy counts.

#### ANSWERING THE POINTS OF PLAINTIFF IN ERROR.

While the foregoing in our judgment is a sufficient answer to plaintiff in error's brief, yet it may be of some service to this court to discuss some of his contentions from our standpoint, in order that the court may have our views on the entire case.

First, we do not for a moment concede that any of the counts were insufficient in either allegation or proof. There was ample evidence to sustain



the verdict of guilty on all counts.

First, as to count two. A sufficient answer to counsel is that we are dealing with conspiracy rather than the consummated offense. Inasmuch as the gist of the offense of conspiracy is the agreement to commit an offense followed by some preparation in the nature of an overt act tending to carry the conspiracy out, the purpose of the conspirators furnishes the test by which their conduct is measured, and not the fact that Yarborough had or had not committed the consummated offense under P. C. 145. The evidence of Roberts himself is to the effect that he and Coyne *thought* Yarborough had committed the offense of violating the White Slave Traffic Act. Roberts offered this explanation as a reason for taking any part in the case. He sent Eugenia Yarborough East, made arrangements for a deposit of money in an Eastern Bank through a Seattle Trust Company. This was amply borne out by Yarborough and daughter. If the jury found from the evidence that the pretenses used had the effect as a whole to induce Yarborough to part with his money through fear of a federal prosecution induced by his friendless condition and

ignorance of the law in question, even though guiltless, is not the criminal conspiracy of Roberts and Coyne complete? Are they any less guilty because Yarborough under all the proof was not guilty of violating the White Slave Traffic Act. They thought he was, accused him of it, and then by specious and devious methods secured his two thousand dollars. Their intention as a whole was to frighten him into parting with his money because of his supposed guilt. Inasmuch as it was a conspiracy to do this, and not the consummated offense, the whole case furnishes ample proof of their criminal purpose and plan with respect to Yarborough.

A careful examination shows but one adjudicated case for the consummated offense under P. C. 145, and this case is of little or no value. Apparently the proposition is in some aspects an original one, but in the case at bar in our opinion it is answered in the statement of it.

### ALLEGED UNKNOWN CONSPIRATORS IN INDICTMENT THOUGH IN FACT KNOWN.

There are cases where the misstatement of such a fact would vitiate the indictment. In this case

how is Roberts prejudiced? Does it affect his own standing one way or the other? Of what avail is it to say that the elusive Lonergan who hovered about on the edges of the conspiracy when it was being planned, should have been named as a co-conspirator?

The evidence does not bear out Mr. Sullivan's statement that an untruthful statement was made in the indictment. Moore at all times denied guilt. Lonergan's part was never definitely known. Things points to his guilt in the grand jury room, and yet there was nothing to show it, and to this day, although we may have our suspicions, there is not evidence enough to base an indictment on, and this after all of the facts were sifted out and weighed in the trial court. Guilty knowledge that other men are conspiring without participation and concerted action is not an offense under P. C. 37. The statement of the prosecutor in his opening is a mere matter of opinion, his own private one which by inadvertence crept into the opening statement. It had no particular bearing on the case. Lonergan offered no evidence, gave no information, and what he personally did in the scheme of things had no

bearing on Roberts. Lonergan got Coyne, and Coyne got Roberts. Lonergan served only to round out the narrative, and to show the jury how by connected sequence of events Roberts and Coyne learned of Yarborough and daughter and their money, et cetera. No statement was made by the prosecution that Moore was ever a conspirator, and the testimony as a whole refutes any suggestion of guilt on his part.

There remains of those who had to do with this conspiracy Nick Collins who was not indicted. In the grand jury investigation there was mention of a man who accompanied Lonergan in a taxicab to hotel, and from hotel on a trip to a fruit store. He was also referred to by Yarborough as "a man who was on the boat with Coyne". His name was never known. His description was never given, and except to add mystery to the transaction, testimony covering this unknown mysterious stranger was of no value. His part in the scheme of crime was then unknown.

By a strange combination of circumstances, the evidence of Yarborough and daughter was procured through the agency of a police matron and special



agents of the Department of Justice at Chicago, who intercepted Eugenia, the girl, while in Chicago waiting for a train to go to Indiana. From her, the names of Yarborough, the father, and of Coyne and Roberts were learned. Later his testimony was secured by a special agent of the department from him in Tennessee, where he had gone by circuitous route after escaping from his captors in Vancouver, B. C. This affidavit figures later in the trial of the case, and becomes the subject matter of one of the assignments of error.

The case at this stage was still lacking in the development of many essential details. Lonergan's part was unknown. Moore had not been located, and Collins was unheard of.

During the course of the pleasure trip of Collins and Coyne from San Francisco to El Paso, during which counsel for plaintiff in error sought to introduce evidence of One Thousand Dollars spent on the women who were taken along, which also is made the basis of an assignment of error, these two, viz., Coyne and Collins, committed the independent and separate offense of violating the White Slave Traffic Act, for the women who were taken through and

into several Federal Districts in as many states were prostitutes, and were taken on the trip in question for immoral purposes. Information relating to this violation of law came to the authorities independently of the case at bar. Acting on this information, Coyne was arrested, indicted, tried and convicted in Texas, and sentenced to eighteen months in prison. Through information secured from the girls, Nick Collins was located in San Francisco after Coyne's conviction in Texas. Collins was indicted in San Francisco, and while on bail waiting trial for his offense in that jurisdiction, for the girls were taken through the Northern District of California, Collins related to the government officers his connection with the Coyne-Roberts conspiracy in Seattle. This information was secured long after the indictment had been returned against Coyne and Roberts, and within a few weeks of the trial of Roberts. Roberts was tried alone, the prosecution having moved for a separate trial for Roberts and a severance of the case. This order of severance and separate trial was granted, and Coyne was not tried for the reason that as he was then serving a substantial sentence for white slavery, the prosecu-

tion could save the government needless expense in bringing him from Leavenworth for trial.

Collins was brought as a witness from San Francisco, while the case against him there was still pending. The case as a whole was made when Collins' testimony in San Francisco and Coyne's statement while in jail at El Paso were given, together with what was learned from Yarborough and daughter and the Seattle witnesses. It will thus be seen that Collins never was known to the grand jurors, Lonergan was never apprehended, and consequently never interviewed, Moore always denied guilt, or guilty knowledge, and the grand jurors left in the dark entirely except as they might indulge in suspicion or inferences from Mrs. Burke's reference to these mysterious persons who called at her home to learn about Yarborough.

It will thus be seen that the indictment told no false story when mention was made of unknown conspirators.

The four remaining counts, of course, make no mention of any one except defendant Roberts and his joint defendant, Coyne, whose case was severed.

REPLY TO PLAINTIFF IN ERROR'S SUB-  
DIVISION ENTITLED "INSUFFICIENCY  
OF THE INDICTMENT".

We think counsel's first point raised, viz., that under the conspiracy to violate Section 145, Penal Code, it is necessary to the offense that a crime should actually have been committed, was sufficiently answered in the general observations in this brief concerning the indictment at bar. Summarizing, however, we urge that inasmuch as a conspiracy to violate the act is charged, and Roberts has admitted in his testimony that he believed Yarborough had violated the White Slave Traffic Act, the crime is complete.

By analogy, the *Barnow* case at 60 L. Edition, page 157, reported in the 239 U. S. page 74, seems almost decisive of the contention raised by counsel for plaintiff in error. In that case it is said:

"It is the false pretense of Federal authority that is the mischief to be cured \* \* \*. Now, the mischief is much the same, and the power of Congress to prevent it is quite the same, *whether the pretender names an existing or a non-existing office or officer, or on the other hand does not particularize with respect to the office that he presumes to hold.* Obvious-



ly, if the statute punished the offense only when an existing office was assumed, its penalties could be avoided by the easy device of naming a non-existing office.”’

Since the Supreme Court holds in this decision that the non-existence of the office which is assumed as a pretense of fraud does not bar responsibility before the criminal law, it would seem that the distortion of certain existing facts in the pretense of a violation of the Federal law, coupled with a claim and suggestion of power as a Federal officer to punish that conduct, is just as reprehensible as the conduct criticized by the court.

As illustrated by the case at bar, it is not always easy for even the trained lawyer, much less the ignorant and unlearned, to know whether certain conduct is or is not within the prohibition of the criminal law. But the purpose of the statute here involved is to prevent the Federal authority as exercised by its public officers from being dragged into disrepute in the estimation of the public.

See also

*Littell vs. U. S.*, 169 Fed. 620.

The same reasoning applies in all its force to counsel's claim of error in the present case. Coun-

sel contends with severe logic that if Yarborough was not guilty, Roberts could not be guilty of threatening to inform against him for the purpose of swindling him out of money. A man's guilt, always dependent upon criminal intent, might or might not exist; yet the harm to society would be as great and the defendant's purpose to obtain money by this species of extortion be as criminal regardless of the victim's guilt or innocence. The best answer to counsel is that Roberts did swindle and extort two thousand dollars from Yarborough by means of his threat to inform, although Yarborough turned out finally to be innocent. His conduct led to the effective result without regard to Yarborough's real status.

Answering the criticism against the consummated counts, the indictment does not state to whom Roberts pretended to be a government officer. The indictment is in the language of the statute. The statute requires nothing to supplement it in describing the criminal offense. Terms of definite criminal import are used. To falsely personate another is an offense by statute in most states. Under the United States statute, for the purpose

of cheating or defrauding, it is an offense to impersonate a government officer and assume to act as such. Every necessary element of crime is contained in the statute, and offense is couched in the language of the statute, with the additional allegation that it was done within the district at a definite time "wilfully, knowingly and feloniously". This indictment in form practically follows the quoted language of the indictment in the *Barnow* case, *supra*, and the *Lamar* case.

We have answered counsel's claim of duplicity by showing in our analysis of the indictment how the two offenses under section thirty-two have been pleaded.

#### INSUFFICIENCY OF THE EVIDENCE.

Counsel indulge in the statement that there was not sufficient evidence to warrant or sustain a conviction. They say there is no evidence that Roberts represented himself as an officer. Bearing in mind that assuming and taking upon himself the functions of an officer in one set of counts, and obtaining money by means of his impersonation in the other, is the gist of the offense, do we not find from the evidence ample proof to support each set of

these counts?

Yarborough and daughter tell a connected story about the conduct of Roberts and Coyne at their Twelfth Avenue lodgings. These men, if Yarborough and daughter were to be believed at all, put them through a third degree inquisition which was quite effective. They charged Yarborough and daughter with a violation of white slave act, spoke of arrest and imprisonment, said something about bail, said they were government officers, and finally took them to the Perry Hotel, kept them under arrest until Monday night, and by threats, imprisonment and false representations secured two thousand dollars from Yarborough. The story of the crime is complete, and finds much to corroborate it in Roberts' own testimony. In addition we have a number of other witnesses who throw light here and there upon the early history of the conspiracy, as well as to corroborate essential and vital details of the offense. A very strong case was presented against Roberts, both on the conspiracy counts and on the consummated offense counts, and the jury could hardly have done otherwise than convict.



## ERROR IN THE REJECTION OF EVIDENCE.

Due to the circumstances under which the record in this case was prepared, it seems proper to state that the bill of exceptions contains a much garbled and quite incomplete statement of the facts, and does not show all that took place with reference to the attempted impeachment of Yarborough by the Tennessee affidavit. The November term expiring on the first Monday of May was extended in April for the purpose of completing the District Court record by preparing and filing bill of exceptions. Writ of Error was sued out at the time the term was extended. Plaintiff in Error was given until June 30th to file his bill of exceptions, and time for filing record in this court extended until August 1st. Many errors were assigned, but no brief was furnished, and errors complained of not argued or assigned at any length. Long after the writ had been sued out, and within a few days of the last day for filing and settling bill of exceptions, to-wit, June 30th, counsel for plaintiff in error presented the bill of exceptions in present form for approval and allowance. Counsel who tried the case was then leaving for Bellingham to prepare an

important government civil case for trial. Other members of the office were exceptionally busy with a grand jury and other government matters. Counsel returned from Bellingham Friday, and on Saturday morning took up the matter of settling lower court record. No opportunity of adding to or supplementing a very poor and incomplete bill of exceptions, was permitted for trial counsel to go through the entire record and thus fill in and supplement the present meager bill of exceptions. In its principal points, with a rider prepared and pasted into the original which counsel for plaintiff in error desired be done rather than suffer delay, for he had but one month for preparation of his appellate record, the bill of exceptions tells a fairly complete story of the crime.

Upon the point that evidence concerning the Yarborough affidavit was rejected, it is not as clear as it might be, yet with the explanation offered the situation in the trial court is easily understood without going outside the record for additional facts. Counsel for the prosecution had the usual photostatic copy of a document furnished by the Department of Justice, but not authenticated. De-

fense counsel at trial made a number of loose rambling observations about it, and propounded some questions to Yarborough concerning an affidavit made by him in Tennessee to a government officer during the early investigation of the case. Yarborough freely admitted making the affidavit. He was then asked if he made the statement in that affidavit that Roberts had said to him that he, Roberts, was a government officer, asking if the term "government officer" was used. Yarborough said he couldn't remember. The counsel for Roberts asked the district attorney trying the case for copy of affidavit which was a part of the government's case file. Upon the district attorney's refusal, defense produced their own copy of the same affidavit, and proceeded to cross-examine from it.

At page 46 of Bill of Exceptions, the following questions and answers were given:

MR. MORRIS: Q. "Mr. Martin, let me ask if the government has in its possession the affidavit to which I have referred, and which the witness has admitted that he made.

MR. MARTIN: A. "Yes."

MR. MORRIS: Q. "Will you allow me to see it?"

MR. MARTIN: A. "I do not think the government should turn over any statements made. We have our confidential files in this case. I have no other except a photostatic copy."

MR. MORRIS: "I will say that I have a copy of that in my possession, but I would like to use the original."

The court at this point sustained the objection. Counsel for defense in the first place could not get Yarborough to make a definite statement as to the contents of an affidavit which he had made months before, and had only read through once at time of making and had not seen again.

Not content with his answer, Mr. Morris in his effort to trap him tried to show that he had made this affidavit which in some minor details was not as full as his then statement on the witness stand. He had a copy of this, and Mr. Martin for the prosecution had one also. The government copy was not authenticated, and would not be legal evidence. Merely a photograph of document on file with the Department. Plaintiff and defendant's copies were alike. Instead of producing notary, proving signature and offering same, counsel for defense sought to use the government's copy to



impeach the government's witness when the witness didn't claim that affidavit stated everything or that it attempted to cover the subject, but did say it was truthful as far as it went, and that he couldn't remember its contents except in a general way.

The mere fact that the prosecution had a copy would not in any manner make it of greater evidential value than the copy in possession of defense. It would not bring out the facts surrounding the making of the affidavit. If the affidavit was silent as to details, it would further have to appear that Yarborough had attempted to give all details of the offense, and that so given his statement on the stand was so materially different as to justify the belief that he had not told the truth in the affidavit, or that he had misstated the facts on the witness stand. When Yarborough couldn't remember the contents of affidavit, counsel for the government was well within his rights in insisting that the regular methods and rules of impeachment be adhered to if counsel wished to discredit the witness. The officer who took this affidavit for the Department of Justice was not present, and the government had no means of knowing the extent of witness' examina-

tion by him when the affidavit was prepared. It was not prepared to meet or explain why the affidavit was not as full or complete as witness' oral testimony. Counsel for defense made no effort to ascertain whether the witness Yarborough had attempted to state all the facts at the time of making the affidavit, or whether he was ever asked concerning the representations of Yarborough when the affidavit was being made, or whether notary or stenographer took a shorthand statement of what was said; nor was Yarborough asked who condensed his remarks into and furnished the narrative form to which his statement was subsequently reduced in the affidavit. The defense having their own copy, and Yarborough's statement on the witness stand that he couldn't remember its text or substance except in a general way, seemed to welcome the opportunity to charge the prosecution with being unfair without laying any foundation for impeachment and following it up at the proper time by competent impeaching evidence.

Under these circumstances, we see no reason why the defense, with a similar copy in their possession, should be allowed to discredit the witness

by showing that government had a partial statement contained in a copy of an affidavit. No effort was made to specifically impeach nor to use their own copy by offering it in evidence. Mr. Morris did use it to ask a number of questions, but seemed in some curious way to wish to use the government's copy when he could not get the witness to deny making the statements in the affidavit. The affidavit in narrative form simply fell short of the detailed statement of the witness on the stand. His testimony was in all its essential details the same at all times. The judgment of conviction and sentence should be sustained.

CLAY ALLEN,  
*United States Attorney,*  
*Attorney for Defendant in Error.*





United States  
Circuit Court of Appeals

For the Ninth Circuit.

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EMMA C. LEE and H. LEE, Her Husband,  
Plaintiffs in Error,

vs.

ALEXANDER LEVISON, LILLIE LEVISON  
and NATIONAL SURETY COMPANY, a  
Corporation,

Defendants in Error.

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Transcript of Record.

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Upon Writ of Error to the Southern Division of the  
United States District Court for the  
Northern District of California,  
Second Division.

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FILED

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F. D. MONCKTON,  
CLERK.



**United States**  
**Circuit Court of Appeals**  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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*In the Southern Division of the District Court of the  
United States for the Northern District of Cali-  
fornia, Second Division.*

EMMA C. LEE and H. LEE, Her Husband,  
Plaintiffs,

vs.

I. W. BERNSTEIN, ALEXANDER LEVISON,  
LILLIE LEVISON, MARY A. OSTROSKI,  
and NATIONAL SURETY COMPANY, a  
Corporation,

Defendants.

**Complaint.**

The plaintiffs complain of the defendants, and allege as follows:

1.

The plaintiffs at all the times in this complaint mentioned were and they still are husband and wife, and they have been during more than six months last past and still are citizens of the State of Washington and inhabitants of and residents in the city of Seattle in the county of King, in the Northern Division of the Western District of said State of Washington.

2.

The defendants I. W. Bernstein, Alexander Levison, Lillie Levison, and Mary A. Ostroski at all the times in this complaint mentioned were and they still are citizens of the State of California and inhabitants of and residents in the city of San Francisco in the county of San Francisco in the Northern District of said State of California.

## 3.

The defendant National Surety Company at all the times in this complaint mentioned was and it still is a corporation duly created and existing under and by virtue of the laws of the State of New York, and having its principal place of business and home office in the city of New York in said State of New York; and by virtue of due compliance with the requirements of the [1\*] laws of the State of California in that regard said corporation was and still is entitled to transact business in said State of California, and to maintain, and was and is still maintaining, a branch office in the city of San Francisco in said State of California in charge of an official and agent of said corporation styled its Pacific Coast Manager, and is transacting business in said State of California through its said branch office; and by reason of the premises said National Surety Company is, for the purposes of jurisdiction of this action by this court, as well an inhabitant of and resident in said city of San Francisco in the county of San Francisco in the Northern District of said State of California, as of said city of New York in the State of New York.

## 4.

On or about July 21st, 1909, at said San Francisco, the defendants, wrongfully contriving and combining together to injure and harass the plaintiff, and unlawfully to coerce her into paying to the defendant Alexander Levison certain moneys which she did not owe and was not bound to pay to him, caused proceedings to be instituted against the plaintiff in the

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\*Page-number appearing at foot of page of original certified Transcript of Record.

police court of said city and county of San Francisco for her arrest and prosecution by the People of the State of California upon a charge of embezzlement of certain moneys in the sum of thirty-two dollars and fifty cents (\$32.50), the property of said Alexander Levison; and to that end the defendant I. W. Bernstein, at the instance and under the direction of each and all of his codefendants herein, appeared on said day before one E. P. Shortall, then a judge of said police court, and then and there made, signed, and before said judge made oath to a criminal complaint in and by which he charged, in substance and legal effect, that this plaintiff had committed the crime of embezzlement of said sum of \$32.50, the property of said Alexander Levison, while the same was in her hands as said Levison's clerk, agent and servant, and prayed that said accused [2] (this plaintiff) might be brought before a magistrate and dealt with according to law; and thereupon said police judge on said day issued and delivered to a police officer of said court a warrant for the arrest of this plaintiff upon said charge as set forth in said complaint, and said police officer thereupon, by authority of said warrant, on said day and at said city of San Francisco arrested this plaintiff and caused her to be confined under said warrant and arrest in the city jail of said city and county of San Francisco for the period of about three hours, at the expiration of which period the plaintiff gave bail for her appearance to said charge, as permitted by an indorsement on said warrant, and was thereupon released from confinement in said jail.



5.

On July 29th, 1909, this plaintiff was tried upon said charge in said police court, before said judge thereof and a jury, and at the conclusion of said trial she was acquitted of said charge by the verdict of said jury duly rendered, and thereupon she was discharged from custody by said police judge and her bail was exonerated.

6.

Said charge against this plaintiff was untrue in fact and in law, and said charge was by the defendants so as aforesaid made against this plaintiff, and said arrest, imprisonment and prosecution of this plaintiff thereon were by the defendants so as aforesaid made, procured, done, instituted and carried on, maliciously and without probable cause.

7.

By reason of the premises, and of said malicious and causeless acts of the defendants, this plaintiff was subjected to great humiliation, and suffered great mental anguish, and suffered in her reputation for honesty and integrity; to her damage in the sum of twenty-five thousand dollars (\$25,000). [3]

8.

Thereupon, and within nine months after said July 21st, 1909, the plaintiff instituted an action in the Superior Court of the State of California for the city and county of San Francisco, against all the defendants in this action as defendants in said action, for the recovery of her said damage by reason of said wrongful charge, arrest, imprisonment and trial, and filed her complaint

in said action and served the same, with a summons to said defendants to appear and defend said action, upon each of said defendants; and in said action all said defendants appeared and defended the same, and joined issues of fact upon the plaintiff's amended complaint therein; and such further proceedings were had in said action that on October 9th, 1911, the same was brought on for the trial of said issues therein and was tried before said Superior Court, which then and there had jurisdiction of the subject matter of said action and of the parties thereto; and at the conclusion of said trial, to wit, on October 17th, 1911, the Judge of said Superior Court presiding at said trial ordered that the plaintiff be nonsuited in said action, and entered a judgment of dismissal thereof upon said nonsuit. Thereupon the plaintiff appealed from said judgment to the Supreme Court of said State of California, and in due course said appeal was heard before said Supreme Court and by it taken under advisement, and finally, on the 26th day of July, 1916, said Supreme Court rendered and entered and filed its opinion and decision on said appeal, affirming said nonsuit and dismissal of said action by said Superior Court, and a judgment of affirmance thereof was accordingly rendered and entered by said Supreme Court in said action, on or shortly after said July 26th.

## 9.

Said nonsuit and judgment of dismissal of said action in said State courts were not and are not a bar to the prosecution and maintenance of another action by the plaintiff against the defendants [4] upon

the same cause of action on which said action in said State courts was based, in this court, which had and has concurrent jurisdiction with said State courts of said cause of action; but the pendency of said former action in said State courts prevented the plaintiff from bringing this action in this court until since said final disposition of said former action in said State Supreme Court.

WHEREFORE, the plaintiff demands judgment in her favor against the defendants for twenty-five thousand dollars, besides her costs herein.

THOMAS R. SHEPARD,

Plaintiff's Attorney.

Office address: 534 New York Bldg.,

Seattle, Washn.

United States of America,

Western District of Washington,—ss.

Emma C. Lee, being first duly sworn, deposes: I am the plaintiff in the within entitled action, and have read and am acquainted with the contents of the within and foregoing complaint therein, and I believe said complaint to be true.

EMMA C. LEE.

Subscribed and sworn to before me, this 16th day of October, 1916.

[Seal]

ALFRED E. HODGSON,

Notary Public in and for the State of Washington,  
Residing at Seattle.

[Endorsed]: Filed Nov. 27, 1916. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [5]

*In the Southern Division of the District Court of the  
United States, for the Northern District of Cali-  
fornia, Second Division.*

EMMA C. LEE and H. LEE, Her Husband,  
Plaintiffs,

vs.

I. W. BERNSTEIN, ALEXANDER LEVISON,  
LILLIE LEVISON, MARY A. OSTROSKI,  
and NATIONAL SURETY COMPANY, a  
Corporation,

Defendants.

**Affidavit of Service of Demurrer.**

State of California,

City and County of San Francisco,—ss.

Arthur W. Jonas, being duly sworn, deposes and says: That he is a naturalized citizen of the United States, over the age of twenty-one years, and is not a party to or in anywise interested in the above-entitled action:

That Thomas R. Shepard is the attorney of record for the plaintiffs in said action, and that his office is at number 534 New York Building, Seattle, Washington, and that he has no office in the city and county of San Francisco, State of California. That on the 21st day of December, 1916, this affiant duly served the annexed demurrer on Thomas R. Shepard, attorney for said plaintiff, by depositing a true copy of the annexed demurrer in the United States Postoffice at the city and county of San Francisco, State of



California, addressed to said Thomas R. Shepard, /534 New York Building, Seattle, Washington; that there is a regular communication by the United States mail from said Postoffice of depositing thereof as aforesaid to said city of Seattle, State of Washington, the place where said Thomas R. Shepard has his office.

ARTHUR W. JONAS.

Subscribed and sworn to before me this 21st day of December, 1916.

[Seal] JULIUS CALMANN,  
Notary Public, in and for the City and County of  
San Francisco, State of California. [6]

*In the Southern Division of the District Court of the  
United States, for the Northern District of Cali-  
fornia, Second Division.*

EMMA C. LEE and H. LEE, Her Husband,  
Plaintiffs,

vs.

I. W. BERNSTEIN, ALEXANDER LEVISON,  
LILLIE LEVISON, MARY A. OSTROSKI,  
and NATIONAL SURETY COMPANY, a  
Corporation,

Defendants.

**(Demurrer and Affidavit of Service.)**

Now comes the defendants Alexander Levison and Lillie Levison above named, and demurs to complaint of plaintiffs herein and for grounds of demurrer specifies:



I.

That the Court has no jurisdiction of the persons of the defendants.

II.

That the Court has no jurisdiction of the subject of the action.

III.

That several causes of action have been improperly united in one and the same count and not separately stated, to wit: An alleged cause of action for conspiracy, together with an alleged cause of action for malicious prosecution.

IV.

That said complaint does not state facts sufficient to constitute a cause of action against these defendants, or either of them.

V.

That the alleged cause of action set forth in plaintiffs' said complaint is barred by the provisions of subdivision one, section 339 of the Code of Civil Procedure of the State of [7] California, which said section of the Code of Civil Procedure of the State of California, was in full force and effect during all the times mentioned in said complaint and is still in full force and effect.

VI.

That the alleged cause of action set forth in plaintiffs' said complaint is barred by the provisions of subdivision three, section 340 of the Code of Civil Procedure of the State of California, which said section of the Code of Civil Procedure of the State of California was in full force and effect during all

the times mentioned in said complaint and is still in full force and effect.

#### VII.

That the alleged cause of action set forth in plaintiffs' said complaint is barred by the provisions of section 343 of the Code of Civil Procedure of the State of California, which said section of the Code of Civil Procedure of the State of California was in full force and effect during all the times mentioned in said complaint and is still in full force and effect.

#### VIII.

That the said complaint is uncertain in this:

(a) That it does not appear nor can it be ascertained therefrom how or in what manner the said defendants or any of them wrongfully or at all contrived or combined together to injure and harass the plaintiff.

(b) That it does not appear nor can it be ascertained therefrom how or in what manner or at all the said defendants or either of them caused proceedings to be instituted against the plaintiff in the Police Court of the said city and county of San Francisco, for her arrest and prosecution by the people of the State of California, upon a charge of embezzlement of [8] certain moneys or upon any other charge.

(c) That it does not appear nor can it be ascertained therefrom how or in what manner the "arrest, imprisonment, and prosecution of the plaintiff, were by the defendants procured, done, instituted, carried on maliciously and without probable cause," the arrest and imprisonment of said defendant, but on the contrary it affirmatively appears from said com-

plaint that this action has been tried before the Superior Court of the city and county of San Francisco, State of California, a court of competent jurisdiction, and has been decided against the said plaintiffs, and that the judgment of said Superior Court of the city and county of San Francisco, State of California, was upon an appeal to the Supreme Court of the State of California, duly affirmed, and that this action has been decided and final judgment rendered therein by a court of competent jurisdiction and is *res judicata*.

## IX.

That said complaint is ambiguous for the reasons set forth in paragraph eight of this demurrer, which reasons are hereby especially referred to and made a part of this paragraph.

## X.

That said complaint is unintelligible for the reasons set forth in paragraph eight of this demurrer, which reasons are hereby especially referred to and made a part of this paragraph.

WHEREFORE, said defendants Alexander Levison and Lillie Levison pray that plaintiffs take nothing by their action, but that these defendants have and recover judgment for their costs herein.

M. H. WASCERWITZ,

Attorney for Defendants Alexander Levison and  
Lillie Levison.

The undersigned, M. H. Wascerwitz, hereby certifies and declares that the above demurrer is in his opinion well taken [9] in point of law, and is not

filed for purposes of delay, but is filed in good faith.

M. H. WASCERWITZ,

Attorney for Defendants Alexander Levison and  
Lillie Levison.

[Endorsed]: Filed Dec. 22, 1916. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [10]

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*In the Southern Division of the District Court of the  
United States, for the Northern District of Cali-  
fornia, Second Division.*

EMMA C. LEE and H. LEE, Her Husband,  
Plaintiffs,

vs.

I. W. BERNSTEIN, ALEXANDER LEVISON,  
LILLIE LEVISON, MARY A. OSTROSKI,  
and NATIONAL SURETY COMPANY, a  
Corporation,

Defendants.

**(Demurrer of Defendant National Surety Company.)**

Now comes the National Surety Company, one of  
the defendants in the above-entitled action, and de-  
murs to the complaint of plaintiffs herein on the fol-  
lowing grounds:

I.

That the said complaint does not state facts suffi-  
cient to constitute a cause of action against this de-  
fendant.

II.

That this Court has no jurisdiction of the person  
of this defendant.



III.

That this Court has no jurisdiction of the subject matter of the action.

IV.

That it appears from the face of the complaint that the plaintiffs in this action submitted themselves to the jurisdiction of the State of California, and more particularly of the Superior Court of the State of California, in and for the city and county of San Francisco, and elected to use that forum as a course of relief for the alleged damages herein complained of and said plaintiffs thereby waived their rights to appeal to the jurisdiction of this court. [11]

V.

That the alleged cause of action is barred by the provisions of the Code of Civil Procedure with reference to the limitation of actions, to wit: Chapter III of Title II of Part II of the Code of Civil Procedure of the State of California, which was in full force and effect at the present time and at all times mentioned in said action.

VI.

That the alleged cause of action set forth in plaintiffs' complaint is barred by the provisions of section 340 of the Code of Civil Procedure, of the State of California, more particularly including (without intending to exclude any other section), subdivision 3 of said section, and that said section 3 is in full force and effect at the present time and that said subdivision 3 was in full force and effect at all times mentioned in said complaint, and provides that an action for false imprisonment or for injury to one



caused by the wrongful act or neglect of another must be commenced within one year after the alleged injury.

## VII.

That the alleged cause of action set forth in plaintiffs' said complaint is barred by the provisions of subdivision one, section 339 of the Code of Civil Procedure of the State of California, which said section of the Code of Civil Procedure of the State of California was in full force and effect during all the times mentioned in said complaint and is still in full force and effect.

## VIII.

That the alleged cause of action set forth in plaintiffs' said complaint is barred by the provisions of section 343 of the Code of Civil Procedure of the State of California, which said section of the Code of Civil Procedure of the State of California, was in full force and effect during all the times mentioned in said [12] complaint and is still in full force and effect.

## IX.

That the said complaint is uncertain in this:

(a) That it is alleged in paragraph IV thereof that the defendants, wrongfully contriving and combining together to injure and harass the plaintiff, and unlawfully to coerce her into paying said moneys caused certain proceedings to be instituted against plaintiff and it cannot be determined therefrom how or in what manner this defendant combined with the other defendants or how or in what

manner this defendant would be benefited by forcing the said plaintiff to pay moneys to Alexander Levison.

(b) It is further alleged in said paragraph IV that I. W. Bernstein "at the instance and under the direction of each and all of his codefendants appeared," and it cannot be determined therefrom how or in what manner this defendant participated in the action of I. W. Bernstein or how or in what manner this defendant exercised any direction over the said Bernstein.

(c) It is alleged in said complaint that certain proceedings were instituted against "the plaintiff" and it cannot be determined therefrom which of the plaintiffs herein was the subject of said action.

(d) It is further alleged that a police officer arrested this plaintiff and it cannot be determined therefrom which of said plaintiffs was arrested.

(e) It is alleged in paragraph VI that certain acts were done maliciously and it cannot be determined therefrom in what manner any malice was shown by this defendant or wherein any act was performed maliciously by this defendant.

(f) It is alleged in said paragraph VI that the certain arrest was without probable cause and it cannot be ascertained therefrom what cause is referred to nor on what subject the said action was without probable cause. [13]

(g) It is alleged in paragraph IX of said complaint that the pendency of a certain former action therein referred to, to wit, a suit for the same cause of action herein stated commenced on July 21, 1909,

in the Superior Court of the State of California, against these defendants prevented the plaintiffs from bringing this action in this court, and it cannot be ascertained therefrom how or in what manner the said action prevented plaintiffs, nor how or in what manner plaintiffs or either of them were prevented from maintaining this action in this court in case they saw fit to dismiss the said action in the State court.

### X.

That the said complaint is ambiguous for the reasons set forth for it being uncertain, and in addition thereto because it is alleged in paragraph VI that the prosecution of this plaintiff was carried on maliciously and without probable cause, and in paragraph VIII that a court having jurisdiction of the subject matter after trial, granted a motion for nonsuit and entered a judgment of dismissal, thereby showing probable cause so great as to convince a court after trial that the action complained of was not brought with malice.

### XI.

That said complaint is unintelligible for the same reasons as those herein set forth as being uncertain.

WHEREFORE, this defendant prays that it be hence dismissed with its costs of suit herein.

HELLER, POWERS & EHRMAN,

Attorneys for Plaintiff. [14]

### CERTIFICATE OF COUNSEL.

The undersigned, counsel for defendants, certify that the above and foregoing demurrer is not filed

for delay and in the opinion of the undersigned is well taken in point of law.

Dated: December 22d, 1916.

HELLER, POWERS & EHRMAN,  
FRANK H. POWERS,

Attorneys for Defendant, National Surety Company.

[Endorsed]: Filed Dec. 27, 1916. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [15]

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At a stated term, to wit, the November term, A. D. 1916, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the city and county of San Francisco, on Saturday, the 27th day of January, in the year of our Lord one thousand nine hundred and seventeen. Present: The Honorable FRANK H. RUDKIN, District Judge for the Eastern District of Washington, designated to hold and holding this Court.

No. 16,024.

EMMA C. LEE et al.

vs.

I. W. BERNSTEIN et al.

**(Order Sustaining Defendants' Demurrers.)**

Defendants' demurrers heretofore submitted being now fully considered and the Court having filed its memorandum opinion, it is ordered that said demurrers be and the same are hereby sustained. [16]



*In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.*

No. 16,024.

EMMA C. LEE and H. LEE, Her Husband,  
Plaintiffs,

vs.

I. W. BERNSTEIN, ALEXANDER LEVISON,  
LILLIE LEVISON, MARY A. OSTROSKI,  
and NATIONAL SURETY COMPANY, a  
Corporation,

Defendants.

### **Judgment of Dismissal.**

The Court having upon motion on behalf of the attorneys for the defendants, and it appearing to the Court that plaintiffs have failed to file an amended complaint herein within the time prescribed by the Rules of this Court after sustaining the demurrer to the complaint; ordered that this cause be dismissed and that judgment be entered herein accordingly:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that plaintiffs take nothing by this action and that defendants go hereof without day, and that said defendants do have and recover of and from said plaintiffs their costs herein expended taxed at \$—.



Judgment entered February 14, 1917.

WALTER B. MALING,  
Clerk.

A true copy.

[Seal] Attest: WALTER B. MALING,  
Clerk.

[Endorsed]: Filed Feb. 14, 1917. Walter B. Maling, Clerk. [17]

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*In the District Court of the United States for the  
Northern District of California, Second Division.*

No. 16,024.

EMMA C. LEE et al.

vs.

I. W. BERNSTEIN et al.

**(Clerk's Certificate to Judgment-roll.)**

I, W. B. Maling, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled action.

ATTEST my hand and the seal of said District Court, this 14th day of February, 1917.

[Seal] WALTER B. MALING,  
Clerk.

By J. A. Schaertzer,  
Deputy Clerk.

[Endorsed]: Filed February 14, 1917. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [18]

*In the Southern Division of the United States District Court, for the Northern District of California, Second Division.*

No. 16,024.

EMMA C. LEE and H. LEE, Her Husband,  
Plaintiffs,

vs.

I. W. BERNSTEIN, ALEXANDER LEVISON,  
LILLIE LEVISON, MARY A. OSTROSKI,  
and NATIONAL SURETY COMPANY, a  
Corporation,

Defendants.

**Opinion, Memorandum.**

THOMAS R. SHEPARD, 534 New York Building,  
Seattle, Washington, for Plaintiffs.

M. H. WASCERWITZ, San Francisco, California,  
for Defendants.

**MEMORANDUM ON DEMURRER.**

RUDKIN, District Judge.

This is an action to recover damages for malicious prosecution.

A demurrer has been interposed to the complaint on the ground, among others, that the action was not commenced within the time limited by law. The bar of the statute is admittedly a complete defense, unless the running of the statute was interrupted or tolled by the pendency of a former action between the same parties for the same cause. Sec. 355 of the Code of Civil Procedure of this State provides as

follows: "If an action is commenced within the time prescribed therefor, and a judgment thereon for the plaintiff be reversed on appeal, the plaintiff \* \* \* may commence a new action within one year after the reversal."

The facts relied upon to bring this case within the foregoing exception, are as follows:

The wrong complained of was committed on and immediately [19] following the 21st day of July, 1909. Within nine months thereafter, the present plaintiffs commenced an action in one of the courts of this State to recover damages therefor. The parties to that action were the same and the cause of action was the same. That action was brought on for trial on the 9th day of October, 1911, and resulted in a judgment of nonsuit. From that judgment the plaintiffs appealed to the Supreme Court of the State where the judgment was affirmed on the 26th day of July, 1916. The present action was commenced within one year thereafter.

The statute in question is too plain and too free from ambiguity to admit of construction and it seems manifest to me that the foregoing facts do not bring this case within the exception. Under the statute two things must concur in order to interrupt or toll the running of the statute; first, there must be a judgment for the plaintiff, and second, there must be a reversal on appeal. While here there was a judgment against the plaintiffs and an affirmance on appeal. Numerous cases have been cited from other jurisdictions holding, as claimed, that such statutes must be given an equitable construction in order that

the right to sue may not be taken away, but a review of these cases would serve no purpose. The question is one of local law and has been set at rest by the decisions of the local courts, *Fay against Costa*, 2 Cal. App. 241. In that case administration was had upon the estate of the plaintiff upon the supposition that he was dead and a decree of distribution was made. Later the plaintiff appeared on the scene and moved the Court to annul the administration proceedings and require the administrator to account for all property received by him. Citation issued, a hearing was had, and a decree entered in accordance with the prayer of the petition, annulling the probate proceedings and awarding the plaintiff judgment against the administrator for the sum of [20] \$1518.68 and costs. An appeal from this judgment was dismissed for want of a proper bond, but later the Supreme Court granted a writ of review and annulled the decree of the Court below. An action was then commenced by the plaintiff to recover from the administrator the value of the property received by him and the statute of limitations was interposed as a defense. There, as here, the action was confessedly barred unless the running of the statute was tolled or interrupted by the proceedings referred to, and there, as here, the plaintiff relied on the prior proceedings to bring the case within the statutory exception. The Court ruled, however, that the action was barred. After quoting the rule laid down by the Code for its own construction, viz: "Words and phrases are construed according to the context and the approved usage of the language; but



technical words and phrases, and such others as have acquired a peculiar and appropriate meaning in law, or are defined in the succeeding section, are to be construed according to such peculiar or appropriate meaning or definition," the Court held that the word "appeal" had a well-defined meaning under the laws of the State and did not include a writ of review. The construction there adopted was much narrower and far more technical than this Court is required to adopt in order to sustain the demurrer. There, there was a judgment for the plaintiff and a reversal by an Appellate Court, while here there was neither. And if the term "appeal" has a well defined meaning in law, most assuredly the terms "judgment thereon for the plaintiff" and "reversed on appeal" have a meaning equally well defined.

The petition to have the Fay case heard in the Supreme Court, after final judgment in the District Court of Appeals, was denied by the Supreme Court, so that the decision of the District Court must be deemed to have the approval of the highest Court in the State.

It was suggested in the brief that the statute did not run [21] in any event because one of the plaintiffs, a married woman, was under disability; but I do not understand that coverture is a disability under the laws of this State. It may be that the husband is a necessary party plaintiff to certain actions brought by the wife, and he may refuse to join therein, but even so, the wife is in no worse plight than any other plaintiff who holds a cause of action



jointly with another who refuses to join. The law affords an ample remedy in such cases.

The demurrer is sustained.

[Endorsed]: Filed Jany. 27, 1917. Walter B. Maling, Clerk. [22]

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*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

EMMA C. LEE and H. LEE, Her Husband,  
Plaintiffs in Error,

vs.

I. W. BERNSTEIN, ALEXANDER LEVISON,  
LILLIE LEVISON, MARY A. OSTROSKI,  
and NATIONAL SURETY COMPANY, a  
Corporation,

Defendants in Error.

**Complaint and Petition for Writ of Error.**

To the Honorable the Judges of the United States  
Circuit Court of Appeals for the Ninth Circuit.

The complaint and petition of Emma C. Lee and H. Lee, her husband, who reside in the city of Seattle in the county of King, in the State of Washington, and in the Northern Division of the Western District of Washington, respectfully alleges and shows unto your Honors as follows:

1. Heretofore, and on or about the 8th day of December, 1916, an action at law was begun in the District Court of the United States for the Northern District of California, Second Division, by your petitioners, Emma C. Lee and H. Lee, her husband, plaintiffs, citizens of the State of Washington,

against I. W. Bernstein, Alexander Levison, Lillie Levison, Mary A. Ostroski, and National Surety Company, a corporation, defendants, citizens of the State of California, to recover of said defendants, joint tort-feasors, damages in the sum of twenty-five thousand dollars (\$25,000), for a false arrest and malicious prosecution of said plaintiff Emma C. Lee, one of your petitioners, as is fully set forth and alleged in their said complaint in said action, on said date filed in said District Court.

2. Said defendants Alexander Levison and Lillie Levison, being served with a summons in said action, thereupon appeared therein by M. H. Wascerwitz, their attorney, and interposed a demurrer to said complaint upon sundry grounds—among others, in [23] substance, that said complaint did not state facts sufficient to constitute a cause of action against said defendants, and that it appeared on the face of said complaint that the alleged cause of action therein set forth was barred by the statutes of limitations of the State of California. And said defendant, National Surety Company, a corporation, being served with a summons in said action, thereupon appeared therein by Heller, Powers & Ehrman, its attorneys, and interposed a demurrer to said complaint upon sundry grounds—among others, in substance, that said complaint did not state facts sufficient to constitute a cause of action against said defendant, and that it appeared on the face of said complaint that the alleged cause of action therein set forth was barred by the statutes of limitations of the State of California. None of the other defendants in the

title of said action were served with summons therein or have appeared at all therein.

3. Thereupon said demurrers were duly brought to a hearing before said District Court at the same time, to wit, on or about the 17th day of January, 1917, and were then heard by said court and taken under advisement by the Honorable F. H. Rudkin, the District Judge then sitting in said court; and thereafter, on the 27th day of January, 1917, said District Judge in open court pronounced and filed his opinion and decision in writing, whereby he sustained said demurrers, and each of them, to said complaint, upon the sole ground that the cause of action set forth in said complaint was barred, as appeared on the face of said complaint, by the statutes of limitations of the State of California; and the plaintiffs not amending their said complaint, but standing on the same as originally filed, said District Court thereafter, on the 14th day of February, 1917, rendered and entered its final judgment dismissing said action, which is of record therein.

3. Your petitioners claim and allege that said District Court erred in sustaining said demurrers to said complaint, and [24] each of them, and in rendering judgment thereon dismissing said action, for the reason that it appears on the face of said complaint that said action was and is not barred by any statute of limitations of the State of California, because (1) said statutes were tolled and the running thereof against the plaintiffs' said cause of action was suspended by the pendency of a certain other action of said plaintiffs against said defendants based

upon the same cause of action, in the State courts of the State of California, not finally decided and terminated until within less than one year next prior to the beginning of said action in said District Court, and not finally disposed of on the merits so as to bar another action between the same parties based on the same cause of action, and (2) said statutes have never begun to run by reason of the coverture and consequent disability of the plaintiff, Emma C. Lee, one of your petitioners, who was the person subjected to the false arrest and malicious prosecution alleged in said complaint; all whereof is more particularly set forth in and appears by your petitioners' accompanying assignment of errors filed herewith, and to which they respectfully refer.

WHEREFORE, your petitioners respectfully pray that a writ of error issue from this Honorable Court to said District Court, commanding it to send up to this court its record in said action, in order that said errors may be by this court examined and corrected; and they herewith tender for the approval of a Judge of this court a bond with surety for the costs of this proceeding, together with the assignment of errors aforesaid.

Dated the 10th day of August, 1917.

THOMAS R. SHEPARD,  
Attorney for Plaintiffs in Error,  
Petitioners. [25]



*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

EMMA C. LEE and H. LEE, Her Husband,  
Plaintiffs in Error,

vs.

I. W. BERNSTEIN, ALEXANDER LEVISON,  
LILLIE LEVISON, MARY A. OSTROSKI,  
and NATIONAL SURETY COMPANY, a  
Corporation,

Defendants in Error.

**Assignment of Errors.**

And now, on this 10th day of August, 1917, come Emma C. Lee and H. Lee, her husband, the plaintiffs in the above-entitled action in the court below, and plaintiffs in error in the above-named court, and make and file this, their assignment of errors, accompanying their complaint and petition for a writ of error this day filed in the above-entitled court, as follows, to wit:

1. The court below, to wit, the District Court of the United States for the Northern District of California, Second Division, erred in sustaining the demurrer of the defendants, Alexander Levison and Lillie Levison, to the plaintiffs' complaint, upon the sole ground that the cause of action set forth in said complaint was barred, as appeared on the face of said complaint, by the statutes of limitations of the State of California, because (1) said statutes were tolled and the running thereof against the plaintiffs' said cause of action was suspended by the pendency of a



certain other action of said plaintiffs against said defendants based upon the same cause of action, in the State courts of the State of California, not finally decided and terminated until within less than one year next prior to the beginning of said action in said District Court, and not finally disposed of on the merits, so as to bar another action between the same parties [26] based on the same cause of action, and (2) said statutes have never begun to run by reason of the coverture and consequent disability of the plaintiff Emma C. Lee, who was the person subjected to the false arrest and malicious prosecution alleged in said complaint—all whereof appears upon the face of said complaint.

2. Said District Court erred in sustaining the demurrer of the defendant National Surety Company, a corporation, to the plaintiffs' complaint, upon the sole ground that the cause of action set forth in said complaint was barred, as appeared on the face of said complaint, by the statutes of limitations of the State of California, because (1) said statutes were tolled and the running thereof against the plaintiffs' said cause of action was suspended by the pendency of a certain other action of said plaintiffs against said defendants based upon the same cause of action, in the State courts of the State of California, not finally decided and terminated until within less than one year next prior to the beginning of said action in said District Court, and not finally disposed of on the merits so as to bar another action between the same parties based on the same cause of action, and (2) said statutes have never begun to run by reason of the

coverture and consequent disability of the plaintiff Emma C. Lee, who was the person subjected to the false arrest and malicious prosecution alleged in said complaint—all whereof appears upon the face of said complaint.

3. Said District Court erred in rendering its judgment, in favor of said defendants Alexander Levison and Lillie Levison, dismissing said action in pursuance of its said decision and order sustaining said defendants' demurrer to said complaint, for the reason that said demurrer was erroneously sustained, as is claimed and set forth in the first assignment of error hereinabove. [27]

4. Said District Court erred in rendering its said judgment, in favor of said defendant National Surety Company, a corporation, dismissing said action in pursuance of its said decision and order sustaining said defendant's demurrer to said complaint, for the reason that said demurrer was erroneously sustained, as is claimed and set forth in the second assignment of error hereinabove.

WHEREFORE these plaintiffs in error pray for a reversal of said judgment of dismissal of said action, and that this cause be thereupon remanded to said District Court for further proceedings therein in accordance with law and with the opinion and decision of said United States Circuit Court of Appeals for the Ninth Circuit upon the hearing of said writ of error; and for their costs of said proceeding in error.

Dated the 10th day of August, 1917.

THOMAS R. SHEPARD,  
Attorney for Plaintiffs in Error.

[Endorsed]: Filed Aug. 10, 1917. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [28]

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*United States Circuit Court of Appeals for the Ninth  
Circuit.*

EMMA C. LEE and H. LEE, Her Husband,  
Plaintiffs in Error,  
vs.

I. W. BERNSTEIN, ALEXANDER LEVISON,  
LILLIE LEVISON, MARY A. OSTROSKI,  
and NATIONAL SURETY COMPANY, a  
Corporation,  
Defendant in Error.

**Bond on Writ of Error.**

Know All Men by These Presents, that we, Emma C. Lee and H. Lee, her husband, of Seattle, King County, Washington, as principals, by Thomas R. Shepard, their attorney of record in the below-mentioned cause, hereunto duly authorized, and Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto Alexander Levison and Lillie Levison, and the National Surety Company, a corporation, and unto each of said obligees jointly or severally as they or any of them may be or become entitled to any benefit of this bond, in the sum of two hundred dollars (\$200), lawful money of the United States of America, for the payment of which sum,

well and truly to be made, we bind ourselves and our respective heirs, representatives and successors, jointly and severally, firmly by these presents. Sealed with our seals and dated this 10th day of August, 1917.

WHEREAS, the above-named Emma C. Lee and H. Lee, her husband, are about to apply for and prosecute a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit to the District Court of the United States for the Northern District of California, Second Division, to reverse the judgment rendered and entered by said District Court on the 14th day of February, 1917, in a certain cause then pending in said District Court, wherein [29] said Emma C. Lee and H. Lee, her husband, were plaintiffs, and I. W. Bernstein, Alexander Levison, Lillie Levison, Mary A. Ostroski, and National Surety Company, a corporation, were defendants;

Now, therefore, the condition of this obligation is such, that if the above-named principal obligors Emma C. Lee and H. Lee, her husband, shall prosecute said writ of error to effect, and answer all costs if they fail to make their said plea good, all without fraud or delay, then this obligation shall be void; else, valid.

EMMA C. LEE. [Seal]

H. LEE, [Seal]

Plaintiffs in Error, and Principal Obligors.

By THOMAS R. SHEPARD,

Their Attorney.

[Corporate Seal]

FIDELITY AND DEPOSIT COMPANY OF  
MARYLAND, [Seal]



By C. K. BENNETT,  
Attorney in Fact.

By ANTHONY PANELLA, Agent.  
Surety.

The form of the within bond and the sufficiency of the surety thereon is hereby approved, this 10th day of Aug., 1917.

WM. W. MORROW,  
United States Circuit Judge and Judge of the U. S.  
Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: Filed Aug. 10, 1917. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [30]

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*In the District Court of the United States for the  
Northern District of California, Second Division.*

EMMA C. LEE and H. LEE, Her Husband,  
Plaintiffs,

vs.

I. W. BERNSTEIN, ALEXANDER LEVISON,  
LILLIE LEVISON, MARY A. OSTROSKI,  
and NATIONAL SURETY COMPANY, a  
Corporation,

Defendants.

**Praeipice for Transcript of Record.**

To the Clerk of the Above-named Court:

You will please prepare, certify and transmit to and file with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, on or before the return day of the

writ of error from that court this day filed in your office to review the judgment of the above-named District Court in the above-entitled cause, a transcript on appeal of the record and judgment in the above-entitled cause, consisting of copies of the complaint, summons and returns of service thereof, demurrers to complaint, opinion and decision of the Court sustaining said demurrers, order entered in pursuance of said decision, judgment of dismissal of said action entered on February 14th, 1917, and writ of error and papers accompanying the same filed in your office.

Dated August 10th, 1917.

THOMAS R. SHEPARD,

Attorney for Plaintiffs, Plaintiffs in Error.

[Endorsed]: Filed Aug. 10, 1917. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [31]

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*In the Southern Division of the District Court of the  
United States for the Northern District of Cali-  
fornia, Second Division.*

No. 16,024.

EMMA C. LEE and H. LEE, Her Husband,  
Plaintiffs,

vs.

I. W. BERTSTEIN et al.,

Defendants.

**Certificate of Clerk U. S. District Court to  
Transcript of Record.**

I, Walter B. Maling, Clerk of the District Court of  
the United States of America, in and for the North-

ern District of California, do hereby certify the foregoing thirty-one (31) pages, numbered from 1 to 31, inclusive, to be a full, true and correct copy of the record and proceedings in the above-entitled cause, as the same remains of record and on file in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is \$12.60; that said amount was paid by the attorney for plaintiffs, and that the original writ of error and citation issued in said cause are hereto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 21st day of August, A. D. 1917.

[Seal]

WALTER B. MALING,  
Clerk U. S. District Court, in and for the Northern  
District of California.

By J. A. Schaertzer,  
Deputy Clerk. [32]

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*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

EMMA C. LEE and H. LEE, Her Husband,  
Plaintiffs in Error,

vs.

I. W. BERNSTEIN, ALEXANDER LEVISON,  
LILLIE LEVISON, MARY A. OSTROSKI,  
and NATIONAL SURETY COMPANY, a  
Corporation,

Defendants in Error.

**Writ of Error.**

The President of the United States of America, to  
the Judges of the District Court of the United  
States for the Northern District of California,  
Second Division, Greeting:

Because in the record and proceedings, as also in  
the rendition of the judgment of a plea which is in  
the said District Court, before you, or some of you,  
between Emma C. Lee and H. Lee, her husband,  
plaintiffs, and I. W. Bernstein, Alexander Levison,  
Lillie Levison, Mary A. Ostroski, and National  
Surety Company, a corporation, defendants, a mani-  
fest error hath happened, to the great damage of the  
said Emma C. Lee and H. Lee her husband, plain-  
tiffs, as is said and appears by their complaint and  
petition for this writ of error:

We, being willing that such error, if any hath been,  
should be duly corrected, and full and speedy justice  
done to the parties aforesaid in this behalf, do com-  
mand you, if judgment be therein given, that then,  
under your seal, distinctly and openly you send the  
record and proceedings aforesaid, with all things  
concerning the same, to the Judges of the United  
States Circuit Court of Appeals for the Ninth Cir-  
cuit, at the courtrooms of said court, in the city of  
San Francisco, California, so that you have the same  
at the said place, before the Judges aforesaid on the  
10th day of September next, that the record and pro-  
ceedings aforesaid being inspected the said Judges  
of the said Circuit Court of Appeals may further  
cause to be done therein, to correct that error, what



of right and according to the law and custom of the  
[33] United States ought to be done.

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the United States, this 10th day of August, in the year of our Lord one thousand nine hundred and seventeen, and of the Independence of the United States the one hundred and forty-second.

[Seal] F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

The foregoing writ is hereby allowed, this 10th day of August, 1917.

WM. W. MORROW,  
Judge of the United States Circuit Court of Appeals  
for the Ninth Circuit. [34]

[Endorsed]: 16,024. In the United States District Court for the Northern District of California, Second Division. Emma C. Lee, et al., Plffs. in Error, vs. I. W. Bernstein et al., Defendants in Error. Writ of Error. Filed Aug. 11, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

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**Return to Writ of Error.**

The answer of the Judges of the District Court of the United States, in and for the Northern District of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of

Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal]

WALTER B. MALING,

Clerk.

By J. A. Schaertzer,

Deputy Clerk. [35]

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**Citation on Writ of Error.**

To Alexander Levison, Lillie Levison, and M. H. Wascerwitz, Their Attorneys, and to National Surety Company, a Corporation, and Heller, Powers & Ehrman, Its Attorneys, Greeting:

You and each of you, said Alexander Levison, Lillie Levison, and National Surety Company, a corporation, are hereby cited and admonished to be and appear at the United States Circuit Court for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, to wit, on or before the 10th day of September next, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Northern District of California, Second Division, at San Francisco, California (and a copy of which writ for each of you is lodged in said clerk's office), wherein Emma C. Lee and H. Lee, her husband, are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered and entered against said plaintiffs in error as in said writ of

error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM W. MORROW, one of the Judges of said United States Circuit Court of Appeals for the Ninth Circuit, this 10th day of August, in the year of our Lord one thousand nine hundred and seventeen, and of the Independence of the United States the one hundred and forty-second.

WM. W. MORROW,  
Judge of the United States Circuit Court of Appeals  
for the Ninth Circuit.

Receipt of the foregoing citation, and of the writ of error therein mentioned, on this 10th day of August, 1917, is acknowledged.

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Attorney for Alexander Levison and Lillie Levison.

HELLER, POWERS & EHRMAN,  
Attorneys for National Surety Company. [36]

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*In the United States District Court for the Northern  
District of California, Second Division.*

EMMA C. LEE and H. LEE, Her Husband,  
Plaintiffs in Error,

vs.

I. W. BERNSTEIN, ALEXANDER LEVISON,  
LILLIE LEVISON and NATIONAL SURETY COMPANY, a Corporation,  
Defendants in Error.

**Affidavit of Service of Citation and Writ of Error.**

United States of America,

State of California,

City and County of San Francisco,—ss.

W. Rea Marshall, of the city and county of San Francisco, being first duly sworn, says that he is a male citizen of the United States, over the age of twenty-one years and not a party to the above-entitled action;

That at 2:30 o'clock P. M. on the 10th day of August, 1917, he personally served the citation and writ of error in the above-entitled action attached to this affidavit upon M. H. Wascerwitz, the attorney of record for Alexander Levison and Lillie Levison in the above-entitled action, by showing the original of said citation and writ of error to the said M. H. Wascerwitz at the law office of said M. H. Wascerwitz at Room 809, Claus Spreckels Building, in the city and county of San Francisco, and delivering to the said M. H. Wascerwitz personally a true copy thereof, the said M. H. Wascerwitz, the attorney of record for the said Alexander Levison and Lillie Levison declining to accept [37] service on said original.

W. REA MARSHALL.

Subscribed and sworn to before me, this 11th day of August, 1917.

[Seal]

C. B. SESSONS,

Notary Public in and for the City and County of San Francisco, State of California. [38]



[Endorsed]: 16,024. U. S. District Court for the Northern District of California, 2d Division. Emma C. Lee, et al., Plaintiffs in Error, vs. I. W. Bernstein et al., Defts. in Error. Citation on Writ of Error. Filed Aug. 11, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

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[Endorsed]: No. 3033. United States Circuit Court of Appeals for the Ninth Circuit. Emma C. Lee and H. Lee, Her Husband, Plaintiffs in Error, vs. Alexander Levison, Lillie Levison and National Surety Company, a Corporation, Defendants in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court for the Northern District of California, Second Division.

Filed August 21, 1917.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.



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In the United States Circuit  
Court of Appeals for  
the Ninth District

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EMMA C. LEE and H. LEE, her  
husband,

*Plaintiffs in Error,*

*vs.*

I. W. BERNSTEIN, ALEXANDER  
LEVISON, LILLIE LEVISON,  
MARY A. OSTROSKI, and NA-  
TIONAL SURETY COMPANY, a  
corporation,

*Defendants in Error.*

No. 3033.

---

IN ERROR FROM DISTRICT COURT FOR  
NORTHERN DISTRICT OF CALI-  
FORNIA, SECOND DIVISION.

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BRIEF OF PLAINTIFFS IN ERROR.

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THOMAS R. SHEPARD,  
*Attorney for Plaintiffs in Error.*

FILED  
OCT 22 1917  
NINTH CIRCUIT





# In the United States Circuit Court of Appeals for the Ninth District

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EMMA C. LEE and H. LEE, her  
husband,

*Plaintiffs in Error,*

*vs.*

I. W. BERNSTEIN, ALEXANDER  
LEVISON, LILLIE LEVISON,  
MARY A. OSTROSKI, and NA-  
TIONAL SURETY COMPANY, a  
corporation,

*Defendants in Error.*

No. 3033.

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IN ERROR FROM DISTRICT COURT FOR  
NORTHERN DISTRICT OF CALI-  
FORNIA, SECOND DIVISION.

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BRIEF OF PLAINTIFFS IN ERROR.

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## STATEMENT OF THE CASE.

This case comes up on a writ of error to review the judgment of the court below dismissing a complaint of the plaintiffs below upon orders sustaining demurrers thereto by the defendants Alexander and

Lillie Levison, and National Surety Company; the plaintiffs having stood upon their complaint and declined to re-plead.

The complaint, after alleging that plaintiffs at all times mentioned have been and still are husband and wife and citizens and residents of the State of Washington, and that the defendants other than National Surety Company are citizens of the State of California and residents of San Francisco County and the defendant National Surety Company is a citizen of the State of New York and also (by maintaining an office and transacting business, under due authorization, in San Francisco) an inhabitant and resident of San Francisco county, California, charges that on July 21st, 1909, the defendants, "wrongfully contriving and combining together to injure and harass the plaintiff, and unlawfully to coerce her into paying to the defendant Alexander Levison certain moneys which she did not owe . . . him, caused proceedings to be instituted against the plaintiff . . . for her arrest and prosecution . . . upon a charge of embezzlement of certain moneys . . . ;" that to that end the defendant Bernstein, at the instance of all his co-defendants, swore out a warrant for her arrest on that charge; that she was

arrested on that warrant and lodged in jail at San Francisco; and that on July 29th, 1909, she was tried upon that charge, and acquitted. The complaint next alleges that said charge was made and said arrest, imprisonment and prosecution instituted and carried on by the defendants, maliciously and without probable cause; and that by reason of the premises the plaintiff was damaged in the sum of \$25,000. The complaint then sets forth, in substance, that within nine months after said date first above named the plaintiff brought suit in the Superior Court of the State of California for San Francisco county against the same defendants here sued upon the same cause of action above outlined, for the same damages here claimed; that in said action all said defendants appeared and defended, issues of fact were joined, the cause was brought to trial on October 9th, 1911, and the plaintiff was non-suited by the trial court, whereupon she appealed to the Supreme Court of the State of California from a judgment of dismissal entered against her on said non-suit, and said supreme court, on July 26th, 1916, affirmed said non-suit and judgment of dismissal; and that said non-suit and judgment of dismissal of said action in said state courts were and are not a bar to another action by the

plaintiff against the defendants upon the same cause of action, in said United States District Court,—of concurrent jurisdiction with said state courts,—but the pendency of said former action in said state courts prevented the plaintiff from bringing this action in said district court until said final disposition of said former action in said state supreme court. Judgment is demanded against the defendants for \$25,000 damages, and costs. This action was begun by filing the complaint in the court below on November 27th, 1916—only four months after the affirmance by the state supreme court of the non-suit and dismissal of the former action; and summons was issued to the marshal on December 11th for service on all defendants.

The Levisons demurred to the complaint jointly, and the National Surety Company separately; one or both of the demurrers specifying sundry statutory grounds of demurrer, and raising other minor points,—none of which need be noticed here, as the court below ignored them,—and both specifying the ground, on which alone they were sustained by the court below, that the action was barred by the California statute of limitations.

The plaintiffs in error submit the following:

## ASSIGNMENT OF ERROR.

The court below erred in sustaining the demurrers to the complaint, and in rendering judgment of dismissal thereon.

## POINTS FOR REVERSAL.

## I.

The statute of limitations is tolled under the California Code of Civil Procedure, §355.

## II.

The statute of limitations is tolled under the California Code of Civil Procedure, §352.

## ARGUMENT.

## I.

As already summarized in our statement of the case, the complaint shows that within the period of statutory limitation an action by these plaintiffs against these defendants was brought and prosecuted to trial in the state court, wherein the plaintiffs were non-suited; that plaintiffs appealed from that judgment to the state supreme court, which affirmed that judgment; and that four months after that affirmance this action was brought, against the same defendants, for the same relief sought in the former action.



The statute here relied on by the plaintiffs in error (§355) provides:

“If an action is commenced within the period prescribed therefor, and a judgment thereon for the plaintiff be reversed on appeal, the plaintiff . . . may commence a new action within one year after the reversal.”

This case does not fall with the *literal* terms of this statute; but the courts of California as well as of other states have held cases to fall within the *equity* of this and similar statutes though not within their words—in short, have construed such statutes *liberally*, so as to counteract the harshness of otherwise unqualified statutes of limitation, which are never favored or extended.

Thus, the Supreme Court of California has held that this section operates to toll the statute although the *new action* (the *words* of the statute) is not the same in form or character as that in which a judgment for the plaintiff was reversed, so long as it is one having for its object the same relief.

*Kenney vs. Parks*, 137 Cal. 527; 70 Pac. 556.

Similarly, in Tennessee it was held, construing a similar statute in which only the words “new action” were used, that any proceeding *equivalent*

to a new action, though not an action at all, might be brought within the period allowed.

*Thomas vs. Pointer*, 14 Lea (Tenn.), 343.

And in Georgia, the new suit brought by leave of such a statute may be waged in the name of the real party in interest, though not the plaintiff in the suit dismissed.

*Gordon vs. McCauley*, 73 Ga. 667.

Nor need the new suit be a literal copy of the first, or be waged against all the defendants to the first suit, where a joint and several liability is claimed (as here, in an action for malicious prosecution against joint tort feasers).

*Cox vs. Strickland*, 120 Ga. 104; 47 S. E. 912.

In Massachusetts it was early held (per Shaw, Ch. J.) that where, after suit and judgment against an administrator, his letters were held void in another proceedings,—after which he was granted new and valid letters of administration,—and thereafter, in a *scire facias* sued out on the judgment mentioned, a plea *puis darrien continuance* on the ground of the nullity of the first letters was sustained, a new suit, begun within a year after that decision but after the statutory limitation had run, was within the spirit, though not the letter, of a

statute substantially equivalent to that of California; the learned Chief Justice saying:

“The proviso in the statute follows this obvious consideration, . . . that where the plaintiff has been *defeated by some matter not involving the merits*, some defect or informality, which he can remedy or avoid by a new process, the statute shall not prevent him from doing so, provided he follows it promptly by suit within a year.”

*Coffin vs. Cottle*, 16 Pick. (Mass.) 383.

In New York the *mere words* of the saving statute were likewise broadened by judicial construction. Thus, where an action brought by a *feme sole* had abated by her marriage, she and her husband were given a new action after the period of limitation had run, as within the *equity* of the statute (N. Y. R. L. ch. 186, §5, corresponding with §§3, 4 of the original English statute, 21 Jac. I., ch. 16).

*Huntington vs. Brinckerhoff*, 10 Wend. (N. Y.) 276.

And where, in an action brought within the limitation period, the plaintiff died before judgment, his executor was given a new action after the limitation had run, as within the *equity* of the first proviso of the New York statute cited above.

*Barker vs. Millard*, 16 Wend. 572.

In Vermont even a discontinuance of the first suit worked by the court's loss of jurisdiction (without the plaintiff's fault) was held to be "clearly within the equity of the (statutory) proviso, although not strictly within its terms." "The same is true where the plaintiff is compelled, by some error in pleading, variance, or otherwise, to become non-suit, without his own fault. And no doubt there are many other cases, not coming technically within the terms of the proviso, which would still be held to come within its equity." (Per Redfield, J.)

*Phelps vs. Wood*, 9 Vt. 399; followed, *Spear vs. Curtis*, 40 Id. 59.

In Rhode Island, the statutory words "abated, avoided, or otherwise defeated," were held to cover a voluntary as well as an involuntary non-suit of the first action.

*Robinson vs. Transp. Co.*, 16 R. I. 637; 19 Atl. 113.

Even a dismissal of the first action for want of prosecution was held, in Georgia, to bring a new action, brought after limitation run, within the *spirit* of a saving statute.

*Roundtree vs. Key*, 71 Ga. 214.

And in that state a suit seasonably brought in

a court having jurisdiction of the subject matter, though not (as ruled in its course, resulting in its dismissal) of the defendant's person, operated to toll the statute of limitations within the *intent* of a saving statute not unlike the section of the California code under consideration.

*Atlanta R. Co. vs. Wilson*, 119 Ga. 781; 47 S. E. 366.

In Ohio, it was held that a similar statute operated to sustain a second suit in a state court, otherwise barred by limitation, although the first suit, begun in a federal court of concurrent jurisdiction, had been dismissed for lack of jurisdiction in that court by reason of non-diversity of citizenship of the plaintiff and a defendant.

*Pittsburg R. Co. vs. Bemis*, 64 Ohio St. 26; 59 N. E. 745.

The opinion in this last case (by Spear, J.) is most instructive in the discussion of the object and spirit of all such saving statutes, and it cites and analyses a multitude of cases illustrating the variety of ways in which courts have stretched the scope and application of statutory words so as to save parties' causes from being held barred by limitation where



their first presentation has in any manner failed of reaching adjudication on the merits.

The saving provisos of these and other states vary much in phrase—some of them are identical in wording with the California statute, some are its substantial equivalent, some are much broader in their express terms; but not one of them is nearly so broad in its literal text as the scope given to it by judicial interpretation. These decisions serve, then, to show the marked leaning of all our courts toward statutory constructions that will save a litigant's grievance from the bar of limitation if it has once been brought seasonably into court but has failed of reaching an adjudication *on the merits*.

Scanning §355 of the California code in that spirit, its *equity* will be found ample to embrace this case. Its *terms* permit a new action (although otherwise barred by time) where the first action, prevailing in the trial court, has been reversed on appeal. The case literally specified rarely gives occasion for a new action, since a *venire de novo* is almost invariably awarded on such a reversal. But the case at bar, though not that literally specified in the statute, differs from it not at all in essence. In the statute-described case, the plaintiff prevailed below but failed above, on the defendant's appeal;

in the case at bar, the plaintiff failed below (but not on the merits, as shown below) and, not content to abide by a mere trial judge's decision, himself appealed, and failed again above. Where is the essential difference between this and a case within the very words of the statute? Does the statute mean to provide that an appellate adverse decision *shall* leave it open to a plaintiff to sue anew regardless of a time limitation, but that if there is added to that adverse decision the weight of a mere trial judge's previous ruling to the same effect, the double decision *shall not* leave it open to the plaintiff to sue anew? Such a causeless distinction can hardly have been contemplated by the lawgiver. Or does the statute mean to extend its grace to a plaintiff who resisted, though unsuccessfully, the defendant's appeal from a ruling for plaintiff below, but not to a plaintiff who took upon himself the burden of a vain appeal from a ruling below adverse to himself? Hardly such a *non-sequitur* as this either, we submit.

Look at it as we will, the equity of leave to "try again" to the litigant who has been defeated both below and above—but not on the merits—is at least as strong as that in favor of one who has pre-

vailed below but on appeal has found the ruling below a broken reed.

And it must always be borne in mind that the nonsuiting of the plaintiffs' first action, below as well as above, was not a decision *on the merits*. For a judgment on the merits is always a bar—*res judicata*; but a judgment of nonsuit is, by express statutory declaration, *not* a bar; therefore, it is not a decision on the merits.

*Cal. Code C. P.*, Pt. II. Tit. VIII. Ch. I.,  
§581 (5), and §582.

Were no statute of limitations involved, and had the plaintiffs, upon the trial judge's nonsuiting them, refrained from appealing, submitted to the judgment of dismissal on the nonsuit, and immediately sued anew in the state court, there can be no question that, under the code provisions last cited, the nonsuit in the first case would not have been a bar to the second. This is the test; and the fact that the plaintiffs have sued anew in a federal court of concurrent jurisdiction instead of in the same court as previously, cannot operate to make that a decision on the merits and consequently a bar which was not such in the state court, or assist the bar of time limitation if the plaintiffs would have been entitled

to toll that limitation had they sued anew in the original forum.

## II.

The California Code of Civil Procedure, §352, provides that—

“If a person entitled to bring an action . . . be at the time the cause of action accrued, either:

. . . 4. A married woman, and her husband be a necessary party with her in commencing such action;

—The time of such disability is not a part of the time limited for the commencement of the action.”

If under our first point we have failed to induce the court to extend by construction, like many other courts, the literal terms of §355 C. C. P., then it logically follows that the court as well as the plaintiffs must be thrown back upon and bound to adhere to a like literal construction of §352; taking nothing from its words, since the court would add nothing to the words of §355. Applying §352 in this way, the plaintiffs are not barred from suing upon the cause of action set forth in this complaint—will never be barred, indeed, so long as their coverture subsists and as a previous suit has not reached a judgment on the merits.

For the complaint alleges that “The plaintiffs

at all the times in this complaint mentioned were and they still are husband and wife"—an averment embracive of the time when the malicious prosecution complained of was instituted and the cause of action thereon accrued. And to an action for malicious prosecution of a wife her husband is a *necessary co-party plaintiff with her*.

"When a married woman is a party, her husband must be joined with her, except:

1. When the action concerns her separate property, or her right or claim to the homestead property, she may sue alone. . . ."

*Cal. C. C. P.*, §370.

Here is a mandatory rule that the husband *must* join with the wife whenever she sues, subject to an exception inapplicable to this case (the other exceptions, not quoted above, are palpably irrelevant); since a cause of action for malicious prosecution of a married woman, if "property" at all, is not her separate property, but community property of her and her husband.

*San Antonio vs. Wildenstein*, 109 S. W. (Texas) 231.

Section 370, therefore, absolutely compels the husband's joinder with the wife in the action; while the letter of section 352, as quoted above, establishes her disability to sue during coverture for this dam-



age provided her husband is a necessary party. This seems an absurd result, inasmuch as the husband did join with her in the former suit upon this cause of action, and now joins with her again in this suit; but *ita lex scripta est*.

We are here simply insisting, let us repeat, that if the court cannot see its way to extending section 355 by construction so as to cover the equity of the plaintiffs' case and save the cause of action from bar by limitation, it will be equally bound, in like adherence to the literal text of sections 352 and 370, to apply them together and thus save the cause of action from bar by reason of the wife's *disability* hitherto—for the existence still of that disability has not been set up as a ground of the demurrers.

The California supreme court has held that section 340, subdivision 3, the limitation applicable to our cause of action, must be read in connection with this section 352.

*Morrell vs. Morgan*, 65 Cal. 575; 4 Pac. 580.

In conclusion, we respectfully beg leave to cite to the court, in further support of this second point, the article (or story) "Under Disability" in *Case and Comment* for December, 1916 (vol. 23, No. 7),

pp. 581-4, and the authorities there cited in note 6,  
on page 584.

THOMAS R. SHEPARD,  
*Attorney for Plaintiff in Error.*



No. 3033

IN THE

**United States Circuit Court of Appeals**

**For the Ninth Circuit**

---

EMMA C. LEE and H. LEE, her husband,  
*Plaintiffs in Error,*

VS.

I. W. BERNSTEIN, ALEXANDER LEVISON,  
LILLIE LEVISON, MARY A. OSTROSKI,  
and NATIONAL SURETY COMPANY  
(a corporation),  
*Defendants in Error.*

**BRIEF OF ALEXANDER LEVISON AND LILLIE LEVISON,  
DEFENDANTS IN ERROR,  
In Reply to the Brief of Plaintiffs in Error.**

---

M. H. WASCERWITZ,  
*Attorney for Defendants in Error,  
Alexander Levison and Lillie  
Levison.*

FILED  
DEC 8 - 1917





No. 3033

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# United States Circuit Court of Appeals

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(a corporation),  
*Defendants in Error.*

---

## BRIEF OF ALEXANDER LEVISON AND LILLIE LEVISON, DEFENDANTS IN ERROR,

In Reply to the Brief of Plaintiffs in Error.

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Plaintiffs in error set forth as their grounds for reversal two points:

(1) They claim that "The statute of limitations is tolled under the California Code of Civil Procedure, Section 355".

(2) They claim that "The statute of limitations is tolled under the California Code of Civil Procedure, Section 352".

Defendants in error respectfully submit that neither of these points is well taken, that the

statute of limitations is not tolled and that the judgment of the District Court is absolutely correct. We will take up these points in their order.

Section 355 of the Code of Civil Procedure of the State of California, provides as follows:

“If an action is commenced within the time prescribed therefor, and a judgment therein for plaintiff be reversed on appeal, the plaintiff, or if he die and the cause of action survive, his representatives, may commence a new action *within one year after the reversal.*”

Plaintiffs in error admit that this case does not fall within the literal terms of this statute, but contend that the case falls within the equity of this statute. What counsel for plaintiff means by this statement is hard to understand. He evidently means that the case does not fall within the terms of the statute passed and created by the legislature of California, but that this court should rewrite the statute and create a statute itself, so as to embrace the case at bar. Counsel cites a number of cases, one from California and the rest from foreign jurisdictions, not a single one of which applies in any respect to the case at bar. For instance, the case cited from California, *Kenney v. Parks* holds that the plaintiff may commence a new action of any kind having for result the same relief as was obtained in the former action *within one year after the reversal*. It is not necessary to dispute that proposition, the decision holds that the plaintiffs could have commenced an action even in a different form,

applying for the same relief, as ~~we~~<sup>was</sup> obtained in the former action providing it is done *within one year after the reversal*. The case at bar was not reversed. Judgment went against plaintiffs in the Superior Court of California and the judgment was sustained in the Supreme Court.

Actions for false imprisonment in California are barred in one year.

C. C. P., Section 340, Subdiv. 3.

Actions for malicious prosecutions are barred in California in two years.

C. C. P., Section 339, Subdiv. 1;

Krause v. Spiegel, 94 Cal. 371;

McCusker v. Walker, 77 Cal. 212.

The alleged false imprisonment or malicious prosecution occurred on July 29th, 1909, more than eight years ago, and hence this action is barred by the statute of limitations, Section 340, Subdivision 3, and Section 399, Subdivision 1, above quoted. The statute could only be tolled if a judgment had been rendered in favor of the plaintiff and that judgment reversed by the appellate court. In that case, and in that case alone, a new action could have been commenced within one year after the reversal. And we can well see the reason for the legislature requiring before the statute can be tolled a judgment in favor of the plaintiff and reversed on appeal. Because by recovering a judgment in his favor, the plaintiff might be lulled to security considering

that he had recovered a judgment and that the judgment of the lower court was correct and relying upon that, might rest upon the judgment in his favor without taking any further action. Therefore, the legislature gave a plaintiff who recovered judgment in the trial court, which judgment was reversed on appeal, a year from the time of such reversal to commence such action. But a plaintiff against whom a judgment was rendered by the trial court could not have been lulled to such security, and therefore the legislature very properly gave to such a plaintiff no such right.

We respectfully submit that it is elementary that where the State courts have passed upon, construed and interpreted a State statute, such a construction and interpretation will be accepted by the Federal courts and is binding upon them. This statute, Section 355 of the C. C. P. of California, has been passed upon, construed and interpreted by the State courts of California, and we submit that such construction should be sustained by this court. We refer your Honors to

Fay v. Costa, 2 Cal. App. 245.

The case of Fay v. Costa is discussed by Judge Rudkin in his opinion in this case. We refer your Honors to the opinion, pages 22 and 23 of the transcript, and we respectfully submit that the opinion of Judge Rudkin is the correct statement of law in this case.

Now, as to the second point made by the plaintiffs in error. That "The statute of limitations is



tolled under the California Code of Civil Procedure, Section 352”.

Counsel for the plaintiffs in error says in his brief that if he has “failed to induce the court to extend the construction of Section 355 of the C. C. P., then it logically follows that the court as well as the plaintiffs must be thrown back upon and bound to adhere to a like literal construction of Section 352”.

The mistake which counsel for plaintiffs in error makes is that this case does not fall in any respect within the provisions of Section 352 of the C. C. P. of the State of California in this, that her husband is not a necessary party to this action. Counsel for plaintiffs in error has entirely overlooked the amendment to Section 370 of the C. C. P.

Section 370 of the C. C. P. as amended in 1913, Statutes of California 1913, Chapter 130, reads as follows:

“When a married woman is a party her husband must be joined with her, except:

Subdivision 1. When an action concerning her separate property including actions for injury to her person, libel, slander, *false imprisonment or malicious prosecution* or her right or claim to the homestead property she may sue alone.”

Your Honors will thus see that for more than four years the husband has not been a necessary party to this action. The plaintiff Emma C. Lee *could have sued alone*. The husband was not, and is not, a necessary party and therefore this case



does not fall within the terms of Section 352 cited by plaintiffs in error at all. The plaintiff could have sued alone, which is a complete answer to counsel's contention. Counsel for plaintiffs in error in his briefs cites Section 370, C. C. P., as it existed prior to August 11th, 1913. Since August 11th, 1913, the actions of false imprisonment and malicious prosecution are added to the exceptions in Section 370, and since the last mentioned date, to wit: August 11th, 1913, the plaintiff could have sued alone, and it was not necessary to join her husband with her in the action.

However, even if the section had not been amended we submit that the statement by counsel for the plaintiffs in error that the cause of action "will never be barred, so long as their coverture subsists" is stretching the effect of the statute to a point beyond all reason. This statement is effectually and completely answered by the California Code of Civil Procedure, Sections 379, and 382.

Section 379 of the C. C. P. reads as follows:

"Any person may be made a defendant  
\* \* \* who is a necessary party to a complete  
determination or settlement of the question  
involved therein."

Section 382 of the C. C. P. reads as follows:

"Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; *but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defend-*

*ant, the reason thereof being stated in the complaint."*

And we submit that even if Section 370 had not been amended that Section 352 relied on by plaintiffs in error must be read in connection with Section 382 and plaintiff Emma C. Lee, if her husband had refused to join in the new action could easily have made him a defendant.

As Judge Rudkin so well says in his opinion:

"It may be that the husband is a necessary party plaintiff to certain actions brought by the wife and he may refuse to join therein but even so, the wife is in no worse plight than any other plaintiff who holds a cause of action jointly with another who refuses to join. The law affords an ample remedy in such cases."

Transcript pages 23 and 24, folio 21.

It is respectfully submitted to your Honors that the judgment of the District Court should be affirmed.

Dated, San Francisco,  
November 30, 1917.

M. H. WASCERWITZ,  
*Attorney for Defendants in Error,*  
*Alexander Levison and Lillie*  
*Levison.*



IN THE

**United States Circuit Court of Appeals**  
**FOR THE NINTH CIRCUIT.**

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EMMA C. LEE and H. LEE, Her Husband,  
Plaintiffs in Error,  
vs.

I. W. BERNSTEIN, ALEXANDER LEVISON, LILLIE  
LEVISON, MARY A. OSTROSKI, and NATIONAL  
SURETY COMPANY, a Corporation,  
Defendants in Error.

---

**Reply of Defendant National Surety Co. to**  
**Brief of Plaintiff.**

---

HELLER, POWERS & EHRMAN,  
Attorneys for National Surety Company, one of the  
Defendants in Error.

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IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

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EMMA C. LEE and H. LEE, her husband,

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vs.

I. W. BERNSTEIN, ALEXANDER LEVISON, LILLIE LEVISON, MARY A. OSTROSKI, and NATIONAL SURETY COMPANY, a corporation,

*Defendants in Error.*

No. 3033

---

REPLY OF DEFENDANT NATIONAL SURETY CO.  
TO BRIEF OF PLAINTIFF.

The learned counsel seems to take great comfort out of the argument that there should be a liberal construction of the statute in question. He even goes so far as to ask this Court to hold that it gives a person who has a judgment against him the same relief as if the judgment had been for him.

The reason for the enactment of the California statute which subsequently became Code of Civil Pro-

cedure, Section 355, quoted by Counsel at page 6, must be apparent.

The legislature provided that if a party because of the existence of a judgment in his favor is lulled into inaction pending the time of an appeal and the statute runs against him prior to the decision of the appeal, and the decision is then rendered on the appeal by the upper court against him and that notwithstanding the decision of reversal he still feels that he has a cause of action not covered by the decision, the Code gives him the right to commence another action based upon the same cause of action, within one year after the reversal.

In this case none of the conditions precedent to put the Section into operation exist.

None of the reasons moving the legislature to the enactment of the code section exist here.

Here there was no judgment for plaintiff. Hence only her own neglect prevented her from commencing a new action immediately after the judgment for nonsuit.

There was no appeal by defendant on which plaintiff was respondent.

Moreover the appeal by plaintiff herself to the upper Court did not bring about a judgment of reversal, but the Supreme Court of the State of California sustained and affirmed the decision of the lower Court in favor of defendant and against plaintiff.

The learned judge who passed upon this demurrer in the lower Court filed a written opinion, set forth

at pages 20 to 24 of the Transcript herein which completely states the law as we understand it.

The learned counsel fails to notice the case of *Fay v. Costa*, 2 Cal. App., 242, therein shown to completely cover the contention here. We think the reasoning is unanswerable.

At page 11 of the Brief, counsel says the case at bar "though not that literally specified in the statute, differs from it not at all in essence," and naively adds,

"In the statute-described case, the plaintiff prevailed below but failed above on the defendant's appeal.

"In the case at bar the plaintiff failed below (but not on the merits as shown below), . . . and failed again above. Where is the essential difference between this and a case within the very words of the statute?"

A mind that could follow that argument could also conceive strength in the argument that if to a proposal of marriage a girl said "no" it was not materially different in effect than if she said "yes."

A discussion on that basis is almost puerile.

As a matter of fact, plaintiff could have brought her action in the Federal Court at any time, after she had become a resident of the State of Washington, even during the pendency of the case in the State Court.

The only effect would have been that when the summons from the Federal Court was served upon defendants that the defendants would have entered

a plea in abatement on the ground that the State Court had first obtained jurisdiction of the controversy. The Federal Court, when it should have ascertained that the State Court had first obtained jurisdiction of the controversy, would have made an order postponing further action until there was a final decision of the controversy in the State Court. After the final decision of the State Court was had plaintiff could have obtained an order requiring defendants to plead and the Federal Court would then have proceeded after pleadings on the part of defendants to have heard the case on the merits.

Plaintiff is now attempting to obtain relief in this Court, notwithstanding the fact of her gross laches.

An almost similar state of facts was passed upon by the Supreme Court of the State of California in *People v. Campbell*, 110 Cal., 644. At page 49 that Court said:

“When the present action was commenced, the action of *Prist vs. Brown* was pending in the same court, and had not been tried. . . . There was thus presented to the court for determination the precise question involved in this motion, and, if this issue had been tried and found against the plaintiff, the judgment of the court would have been determined by the judgment in the former action.”

At page 650 the Court says:

“When this cause was here upon the former appeal, the appellants urged the reversal of the judg-

ment because of the prior judgment in the case of *Prist vs. Brown*, which they had pleaded as a bar to any further litigation of the issue then determined. In holding that this plea of a former judgment was unavailing, for the reason that the judgment had not become final, the court said: 'But while the judgment in *Prist vs. Brown*, et al., was not for the reason stated a bar to the cause of action alleged in the cross-complaint, still the pendency of that action would have been a good ground for the continuance of this until the final determination of the former action, or would have been a sufficient basis for an order dismissing the present action upon motion of the plaintiff, notwithstanding the affirmative relief demanded by the defendant Priest in his cross-complaint, and the refusal of the court to have granted either of such motions would perhaps have been erroneous; but no such motion was made by the plaintiff, and the trial proceeded without objection, the plaintiff still insisting upon the judgment in *Prist vs. Brown et al.*, as an estoppel and as ground for a judgment in his favor.' In *Harris v. Barnhart*, 97 Cal., 546, it was said: 'Where a judgment is effectual as evidence in a plea of former adjudication until the time for an appeal therefrom has expired, the true course of a defendant in such a case would be to plead the pendency of the former action in abatement, until the judgment therein became final, when a supplemental answer averring the proper facts in bar of the action would be in order.'"

We cannot follow counsel in his argument based upon *Kenny v. Parks*, 137 Cal., 530.

In that case the plaintiff began suit against the defendants because of certain fraudulent transactions



with reference to the transfer of certain real property and the plaintiff recovered judgment against the defendants and was put in possession of the lands.

After an appeal was taken there was a reversal of the judgment by the Supreme Court and another suit, to-wit: that which was the subject of the decision referred to by counsel, was commenced within a year of the judgment of the reversal.

The only point decided there was that although the new suit was based on a slightly different statement of facts, to-wit: that the depositary of the deeds in the first case was a third party, and in the second case, the grantee himself, the Court held that the principle was not affected.

Counsel has referred to decisions in several states other than California which are based upon the peculiar wording of the several statutes of those states.

Then at page 11 he says:

“The savings provisos of these and other states vary much in phrase—some of them are identical in wording with the California statute, some are its substantial equivalent, some are much broader in their express terms; but not one of them is nearly so broad in its literal text as the scope given to it by judicial interpretation.”

It would be much more to the point if counsel would cite some case where the Court held that the decision for the plaintiff will have the same effect

as a decision for the defendant from some state that has a statute of limitation that is identical with that in California.

The nearest counsel has come to a case squinting at any assistance to his theory is the case of *Pittsburg etc. Ry. Co. v. Bemis*, 59 N. E., 745.

This is a case from Ohio and the judge rendering the opinion quotes Sec. 4991, Revised Statutes of that state, as follows:

"If, in an action commenced, or attempted to be commenced, in due time, a judgment for the plaintiff be reversed, *or if the plaintiff fail otherwise than upon the merits*, and the time limited for the commencement of such action has, at the date of such reversal or failure, expired, the plaintiff . . . may commence a new action within one year after such date."

It will be observed that the Ohio statute adds an entirely new and separate provision which is entirely absent from the California statute, viz., if the plaintiff fail otherwise than upon the merits.

There is no such provision in the laws of the State of California.

So in the case of *Atlanta K. & N. Ry. Co. v. Wilson*, 47 S. E., 366.

The decision there turns upon the peculiar wording of the Georgia statute. The Court holds that section 3786 of the Civil Code, 1895 Georgia, is remedial and to be liberally construed so as to preserve the right to renew the cause of action set out

in a previous suit wherever the same has been disposed of on any ground other than one affecting its merits.

This section, No. 3786, provides as follows:

“If a plaintiff shall be nonsuited or shall discontinue or dismiss his case and shall recommence within six months, such renewed case shall stand upon the same footing, as to limitation, with the original case; but this privilege of dismissal and renewal shall be exercised only once under this clause.”

It will be observed that an entirely new proposition not contained in the laws of the State of California, viz: if a plaintiff shall be nonsuited, is the basis on which this decision rests.

Similarly the case of *Roundtree v. Key*, 71 Georgia, 214, turns upon the language of the same Georgia Code.

Similarly in the case of *Robinson v. Merchants' & Miners' Transp. Co.*, 19 Atl., 113.

This turned upon the peculiar provisions of a Rhode Island statute, to-wit:

“Pub. St. R. I. c. 205, Sec. 8—If any action duly commenced within the time limited and allowed therefor in and by this chapter, shall be abated, or otherwise avoided or defeated, by the death of any party thereto . . . the plaintiff may commence a new action for the same cause at any time within one (1) year after the abatement or other determination of the original suit.”

The Court says, at page 114:

"The obvious purpose of the section is to enable a plaintiff to bring an action after the general period of limitation has expired, provided he has duly commenced any action for the same cause within said period, and lost the benefit of it in either of the modes described, and the section, being remedial, should be liberally construed in furtherance of its purpose."

It will be observed that there is an entirely different and separate addition to the relief provided for in the California statute.

The case of *Phelps & Bell v. Nathan Wood*, 9 Ver., 399, was one where plaintiff had brought suit before a justice of the peace within time.

The justice of the peace continued the cause once and was absent the second time appointed for trial and under the peculiar provisions of the Vermont law there was no provision for the cause being continued in the absence of the justice except on the day set for trial.

Under those circumstances the Court held that the plaintiff had a right to commence another suit, adding:

"If the plaintiffs had discontinued their own suit or voluntarily become nonsuited therein, it is evident that they could not rely upon that suit to prevent the operation of the Statute of Limitations."

This again turns upon the peculiar wording of the

Vermont statute which was not similar to the California statute.

Again in the Tennessee case of *Thomas v. Pointer*, 14 Lea, 345, the Court quotes the code of that state as saying,

“that if an action be commenced within the time limited, but the judgment or decree is rendered against plaintiff, upon any ground not concluding his right of action . . . the plaintiff . . . may from time to time commence a new action within one year after reversal or arrest.”

So in the case of *Huntington v. Brinckerhoff*, 10 Wendell, 276, at page 281, the Court sets forth the provisions of the revised statute of New York at the time the pleadings were framed, and then says:

“The Revised Laws, 1 R. L., 186, Sec. 5, after limiting certain actions to be brought within given periods, contain a provision that if in any of the actions specified, judgment shall be given for the plaintiff and the same be reversed for error, or if after a verdict for the plaintiff the judgment shall be arrested, or if in a suit by original, defendant be outlawed and such outlawry afterwards reversed the plaintiff . . . may commence a new action, from time to time within one year next after such judgment be reversed, arrested or outlawry reversed, and not after.”

The case turns upon whether executors could commence a suit after the death of their testator, and the Court holds the better opinion is that where the six years have run at the death of the plaintiff, the suit



could be commenced by the executor or administrator within a year, in analogy to the statute whence the rule is derived.

So in the case of *Barker v. Millard*, 16 Wendell, 572, the Court quotes the same statute and then says:

“Where the action is brought within six years and the plaintiff dies before judgment, his executor or administrator may have a new action within the equity of the first proviso.”

In the case of *Cox v. Strickland*, 47 S. E., 912, at page 915, the Court held that under the Georgia statute,

“if the suit was disposed of on any matter not concluding the merits of the cause of action, or any of the causes of action asserted in the proceeding by one party against the other, it might thereafter be seasonably renewed in the proper forum, in proper form, against any of the proper and all of the necessary parties therein. Some of the statutes on this subject are much more narrow than that contained in the Civil Code of 1895, Sec. 3786. Some limit it to cases in which there has been an involuntary nonsuit; others to dismissal by the court for some matter of form not involving the merits; others to dismissal as the result of a reversal; others to cases where the judgment in favor of the plaintiff has been arrested or set aside,”

and then adds:

“But our statute, construed in the light of the acts from which it was codified, is very broad. It can-

not mean that the form and parties to the new cause shall in all respects be identical with the former."

It is very evident that if Judge Lamar had been passing upon a code provision similar to our Sec. 355, he would have decided that case very differently.

This same Georgia Court interpreting Sec. 2932 of the Code, which at the time of the decision was in the same words and effect as Section 3786, has held that this section of the Code did not apply where the first action was commenced in the Federal Court and renewal was thereafter petitioned for in the State Court,

*Constitutional Pub. Co. v. De Laughter*, 21 S. E., 1000,

and also that where a suit had been removed from a State Court to the Circuit Court of the United States, that the jurisdiction of the State Court ceased and after a nonsuit in the Federal Court the case could not be renewed in the State Court within six months.

*Cox v. The East Tennessee, Virginia and Georgia Railroad*, 68 Geo., 446.

The point with reference to the suit being barred because plaintiff was a married woman and her husband was a necessary party under Subdivision 4 of Section 352, is almost impossible to understand.

Plaintiff's husband joined with her in this action and joined with her in the original action in the Superior Court of the State of California. Mrs. Lee and her husband, both having had their day in the California State Court, cannot now be heard to claim that Mrs. Lee was under disability where her husband was a necessary party with her in commencing the action.

Had she alleged that it was impossible for her to commence the action because her husband would not join with her, there might have been something to be discussed, but in view of the condition of the pleadings at the present time we feel that the argument is a moot question which need not be discussed at this time.

In a case of this character a motion for nonsuit can of course only be made after plaintiffs have set forth their full case.

The reasons for allowing the case to be tried the second time do not obtain in such cases as they do in suits for the payment of money where the reason for the statute of limitations is a presumption that the claim has been paid where suit is not brought in a certain time.

We respectfully submit that there is no reason why

any law should be construed to assist a plaintiff in an action like this beyond the time given by the law where there has been a trial and motion for nonsuit and a review of the testimony in the upper Court.

The plaintiffs having elected to commence a suit in the State Court and having neglected to keep alive their alleged cause of action by concurrent suit in the Federal Courts they should certainly not be gainers by their own negligence.

The demurrer was properly sustained.

Respectfully submitted.

HELLER, POWERS & EHRMAN,  
Attorneys for National Surety Company, one  
of the Defendants in Error.

**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

---

JACK LESAMIS, JOHN TYAPAY, ANDY  
GARBIN, GEORGE STANLEY and SAM  
SALO,

Appellants,

vs.

H. GREENBERG,

Appellee.

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**Transcript of Record.**

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Upon Appeal from the United States District Court for  
the District of Alaska, Second Division.

**Filed**  
SEP 10 1910  
F. D. Monckton,  
Clerk.





**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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**Names and Addresses of Attorneys of Record.**

J. F. HOBBS, Nome, Alaska,

WM. A. GILMORE, Nome, Alaska,

Attorneys for Plaintiff.

G. J. LOMEN, Nome, Alaska,

O. D. COCHRAN, Nome, Alaska,

Attorneys for Defendants. [2\*]

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*In the District Court for the District of Alaska,  
Second Division.*

No. 2349.

H. GREENBERG,

Plaintiff,

vs.

JACK LESAMIS, JOHN TYAPAY, ANDY  
GARBIN, GEORGE STANLEY and SAM  
SALO,

Defendants.

**Complaint in Equity.**

Comes now plaintiff and for cause of action against the defendants above named, alleges as follows:

**I.**

That heretofore and on the 19th day of March, 1910, and for a long time prior thereto, the defendants, Jack Lesamis, John Tyapay and Andy Garbin, were the owners and in the possession of certain placer mining claims situated in the Neatuk-Kobuk Mining and Recording District, District of Alaska, and that the legal titles to the said

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\*Page-number appearing at foot of page of original certified Transcript of Record.

placer mining claims stood in the names of the said defendants by virtue of certain placer locations by them theretofore made in said mining district; that on the said 19th day of March, 1910, the said defendants, Jack Lesamis, John Tyapay and Andy Garbin entered into certain written instruments whereby and wherein they agreed with the plaintiff to form a copartnership to work and mine the said mining claims and to give and convey to the plaintiff an undivided one-quarter ( $\frac{1}{4}$ ) interest in all of the said placer [3] claims, lode claims and water rights then owned, acquired or to be acquired by the said defendants in consideration that the plaintiff furnish them with provisions from time to time from the said 19th day of March, 1910, up to and until July, 1910, and agreed to pay said defendants the sum of six thousand dollars (\$6,000.00) in cash and thereafter the further and additional sum of twenty-four thousand dollars (\$24,000.00) from the net profits of the mining operations to be thereafter conducted and had upon said mining claims; that the said agreement between the parties, plaintiff and said defendants, was reduced to writing and incorporated in the following two written instruments which said instruments were executed, witnessed and delivered between the parties, to wit:

#### AGREEMENT.

Klery Creek, March 19th, 1910.

Know all men by these presents That we the undersigned John Tyapay, Andy Garbin and Jack Lesamis of the Noatak-Kubuk recording district, District of Alaska, and H. Greenberg of Nome,

Ala. enter into this agreement, that for the sum of one dollar lawful money of the United States in hand paid and other valuable service, for same services, H. Greenberg is, and shall be a full-fledged partner with the above-mentioned parties and have one-quarter undivided interest in all claims, lodes, water-rights acquired or to be acquired and owned by the above-mentioned parties. It is further agreed that H. Greenberg is to furnish the above-mentioned parties with provisions from time to time up to till July 1910.

ANDY GARBIN. (Seal)

JACK LESAMIS. (Seal)

JOHN TYAPAY. (Seal)

H. GREENBERG.

Witnesseth:

SAM MAGIDS,

HERMAN BERNHARDT." [4]

This indenture made the 19th day of March in the year of our Lord one thousand nine hundred and ten between the undersigned Andy Garbin, Jack Lesamis and John Tyapay of the Noatak-Kobuk, Recording District, of the District of Alaska, parties of the first part and H. Greenberg of Nome, Alaska, party of the second part witness, That the said parties of the first part, for and in consideration of the sum of Thirty Thousand Dollars (\$30,000.00).

Six Thousand Dollars (\$6,000.00) in lawful money of the United States of America to them in hand paid by said party of the second part, The receipt whereof is hereby acknowledged, and the balance of Twenty-four thousand to be paid of the first money taken out of the ground hath, granted, bar-

gained, sold remised, released and forever quit-claimed, and by these presents doth grant, bargain, sell, remise, release and forever quitclaim unto the said party of the second part, his heirs and assigns one-quarter ( $\frac{1}{4}$ ) undivided of all mining claims located, surveyed, recorded and held by said parties of the first part situated in Noatak-Kobuk mining district, district of Alaska, together with all the dips, spurs and angles, and also the metals, ores, gold and silver bearing quartz, rock and earth therein, and all the rights, privileges, and franchises thereto incident, appendent and appurtenant, or therewith uusually had or enjoyed; and also all and singular the tenements, hereditaments and appurtenances, thereunto belonging, or in any wise appertaining, and the rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well as in law as in equity, of the said party of the first part, of, in or to the said premises and every part or parcel thereof, [5] with appurtenances.

To have and to hold, all and singular, the said premises, together with the appurtenances and privileges thereto incident, unto the said party of the second part his heirs and assigns forever warranting and defending the same against the claims of all persons, save and except the United States.

ANDY GARBIN. (Seal)

JACK LESAMIS. (Seal)

JOHN TYAPAY. (Seal)

Witnesseth:

SAM MAGIDS,

HERMAN BERNHARDT."



## II.

That thereafter and at all times since said 19th day of March, 1910, plaintiff has fulfilled and carried out the terms, covenants and conditions on his part to be done, made, kept and performed, and did furnish the said defendants with the provisions mentioned in said written instrument and did pay to said defendants the said sum of six thousand dollars (\$6,000.00) in lawful money of the United States, and the said defendants thereupon and in pursuance of the terms of said written instrument, entered into the mining copartnership known, named and called the Klery Creek Mining Company, and thereupon began mining operations upon the said placer claims hereinafter named and set forth.

## III.

That at the time said instruments were executed and delivered, the said defendants, Jack Lesamis, John Tyapay and [6] Andy Garbin, were the owners and in the possession of the following placer mining claims:

Discovery Claim, One Above Discovery, Two Above Discovery, Six Below Discovery, Fraction between two and Three Above Discovery, Association Fraction Between Discovery and Starr, California Association, L. L. Klery Creek, Opposite Discovery, Butte Association, R. L. Klery Creek, Opposite Discovery, Oregon Association (Bench and Creek) adjoining upper and Starr, and lower end 1 and 2 above Discovery, Bench Seven, opposite Creek Claim Seven Below, Gold Hill Association R. L. opposite 1, 2, 3 and 4 creek claims. All



the foregoing claims being situated on Klery Creek, in its benches. Also Honey Claims, one and two, between Klery and Bear Creeks, Northpole Association L. L. adjoining claims, last above described, One and Two Above Discovery, on Bear Creek, Goldfield Association opposite 1 and 2 above and 1 below L. L. Bear Creek, Rich Association on Bear Creek, and adjoining 2 above, Central Association, adjoining No. 1 below, on Central Creek, Discovery on Central Creek, One above on Central Creek, One Below on Central Creek, Fraction (Garbin) on Central Creek, Discovery Claim on Jack Creek, a tributary of Klery; all interest of said first party in all mining claims owned in whole or part in Rocky Creek, in said mining and recording district. And thereupon the said Klery Creek Mining Company entered into possession of said claims and began to mine and operate the same as a mining copartnership; that thereafter the said Klery Creek Mining Company operated the said placer mining claims in the said Klery Creek and vicinity in the Noatak-Kobuk Recording District, between said 19th day of March 1910, and the 10th day of August, 1911; that during said term [7] and time said mining claims were operated at a loss to the said mining copartnership at approximately the sum of eighteen thousand dollars (\$18,000.00); that said indebtedness is due to the firm of Robinson, Magids Co., or assignee, for goods, wares and merchandise and for money advanced at the request of said Klery Creek Mining Company.

## IV.

That on or about the 10th day of August, 1911, the said Klery Creek Mining Company executed several written leases upon several of the said mining claims above mentioned belonging to the said Klery Creek Mining Company for the purpose of having said copartnership property mined during the present winter, under all of which said leases certain stipulated royalties were reserved to be paid to said mining copartnership.

## V.

That heretofore and on or about the 13th day of August, 1911, the defendants, Andy Garbin and Jack Lesamis, in violation of the terms and conditions of the said copartnership instruments, entered into a conspiracy to defraud this plaintiff of his rights in the said Klery Creek Mining Company, and thereupon collusively and fraudulently and without any consideration, transferred and assigned all of their right, title and interest in the said Klery Creek Mining Company, copartnership property, consisting of said placer mining claims on Klery Creek and vicinity in said Noatak-Kobuk Recording District, to said defendants, George Stanley and Sam Salo, both of whom were and are insolvent. [8]

## VI.

That the said written instruments executed and delivered as above alleged on the 9th day of March, 1910, were thereafter duly recorded in the office of the recorder of the said Noatak-Kobuk Recording District, District of Alaska, on the 29th day of March,

1910, and the said defendants, George Stanley and Sam Salo, took and received the said transfers of title from the said defendants, Jack Lesamis, and Andy Garbin, with full knowledge and notice of the said written instruments of the said copartnership and with full knowledge and notice of the fact that the said Klery Creek Mining Company had outstanding indebtedness at said time of approximately the sum of eighteen thousand dollars (\$18,000.00) incurred in mining operations, over and above all production of gold from said mining claims so conveyed.

## VII.

That the said transfer from the said defendants Lesamis and Garbin to the said Stanley and Salo were made for the purpose and with the intent of changing and modifying the said original copartnership agreement, and immediately thereafter the said defendants, Stanley and Salo, threatened to and did claim and do now claim, that they by reason of the said assignment were and are now entitled to the sum of twenty-four thousand dollars (\$24,000.00) from the gross output of said mining claims, and now claim and assert that they are entitled to said sum of twenty-four thousand dollars (\$24,000.00) before the said indebtedness of eighteen thousand dollars (\$18,000.00) is paid or the expenses of operating the said mining claims is paid and defrayed. [9]

## VIII.

That the said defendants, Stanley and Salo, are now claiming to be the lessors of the lessees who

are working the said mining claims and threaten to and will collect or attempt to collect the royalties and the entire output of the said placer mining claims belonging to the said Klery Creek Mining Company, under their alleged claim for payment of twenty-four thousand dollars (\$24,000.00) alleged to be due them in disregard of the present indebtedness of said Klery Creek Mining Company, and contrary to the intent of the formation of said Klery Creek Mining Company, as above alleged.

## IX.

That heretofore and on the 24th day of October, 1911, one Philip Murphy, claiming an assignment of the account of said Robinson, Magids & Co., creditor of said Klery Creek Mining Company, began an action at law in the above-entitled court for the collection of the sum of seventeen thousand one hundred twenty-four dollars (\$17,124.00) and interest against the said Klery Creek Mining Company, consisting of the defendants, Jack Lesamis, John Tyapay and Andy Garbin, and this plaintiff, and caused to be issued a writ of attachment against the mining property of said Klery Creek Mining Company; that said amount is justly due the said Robinson, Magids & Co., or their assignee the said Philip Murphy, and should be paid from the first gold or gold-dust taken, or extracted, mined or received from the said placer mining claims, before the said sum of twenty-four thousand dollars (\$24,000.00) or any other amount is payable to the said defendants, Jack Lesamis or Andy Garbin. [10]



## X.

That owing to the acts and actions of the said defendants, Jack Lesamis and Andy Garbin, as above alleged, it is impossible for the plaintiff and said defendants to further act and conduct the mining copartnership in the management and working of said mining copartnership property and mining claims, that said defendants, George Stannley, Sam Salo, Andy Garbin, Jack Lesamis and John Tyapay, are all insolvent and have no other property of value other than their alleged interest in the said copartnership mining property, and unless the Court appoint a receiver of this court to take possession of the said mining copartnership property and mining claims and collect the royalties, rents and profits thereof, the same will be wholly dissipated by the said defendants, and the plaintiff will be compelled by law to pay the indebtedness of said mining copartnership from his personal assets; that the said defendants, Jack Lesamis, Andy Garbin and Jack Tyapay, refused to account to the plaintiff and have refused and still refuse to enter into an accounting between the plaintiff and the said defendants, with reference to the expenses and output of the said copartnership under the terms and conditions of said copartnership agreement, and said defendants, Stanley and Salo, threaten to assume the management and control of the copartnership assets of said Klery Creek Mining Company and threaten to appropriate the rents, royalties and profits to their own use and benefit, and



threaten to and do ignore the debts and liabilities of said Klery Creek Mining Company, to the damage and injury of the plaintiff. [11]

WHEREFORE, plaintiff prays the Court as follows:

1. For a restraining order against the defendants and each of them enjoining and restraining them and each of them *pendente lite* from in any manner transferring, assigning, encumbering or conveying in any manner or way, whatsoever, any interest in the said mining claims above alleged, the property of the said Klery Creek Mining Company.

2. That the Court appoint a receiver of this court to take possession of said mining claims and hold the possession subject, however, to the leases heretofore given for the purpose of accepting and receiving subject to the orders of the Court, all rents, royalties and profits from the operation of the mining claims of the said Klery Creek Mining Company.

3. That the Court make an accounting between the plaintiff and defendants of all and every matter arising under and by virtue of the said mining copartnership, and that the Court order and direct the said receiver to pay and defray from the rents, royalties and profits collected by him, any and all indebtedness now existing against the said Klery Creek Mining Company, including the amount due to the said Robinson, Magids & Co., or their said assignee, Philip Murphy.

4. That the Court enter a final decree dissolving the said copartnership and directing a sale of all of

said property, both real and personal, and directing a distribution of the proceeds among the members of the said copartnership if any proceeds exist after the satisfaction of all indebtedness found to be due.

[12]

5. That the plaintiff be decreed and adjudged entitled to his costs and disbursements in this action against the said defendants.

6. And that the plaintiff be entitled to such other and further relief as to the Court seems meet and proper.

J. F. HOBBS and  
WILLIAM A. GILMORE,  
Attorneys for Plaintiff.

United States of America,  
District of Alaska,—ss.

H. Greenberg, being first duly sworn, deposes and says:

That he is the plaintiff in the above and foregoing action; that he has heard read the above and foregoing complaint, knows the contents thereof and the same is true as he verily believes.

H. GREENBERG.

Subscribed and sworn to before me this 30th day of October, A. D. 1911.

[Notarial Seal] WILLIAM A. GILMORE.

Notary Public in and for the District of Alaska.

[Endorsed]: No. 2349. In the District Court for the District of Alaska, Second Division. H. Greenberg, Plaintiff, vs. Jack Lesamis et al., Defendants. Complaint. Filed in the Office of the Clerk of the

District Court of Alaska, Second Division, at Nome.  
Nov. 1, 1911. John Sundback, Clerk. By ———, Deputy. L. J. H. Hobbes and William A. Gilmore, Attorneys at Law, Nome, Alaska. Attorneys for Plaintiff. [13]

*In the District Court for the District of Alaska,  
Second Division.*

No. 2349.

H. GREENBERG,

Plaintiff,

vs.

JACK LESAMIS, JOHN TYAPAY, ANDY GAR-  
BIN, GEORGE STANLEY and SAM SALO,  
Defendants.

**Summons.**

The President of the United States of America, to  
Jack Lesamis, John Tyapay, Andy Garbin,  
George Stanley and Sam Salo, defendants,  
GREETING:

You are hereby summoned and required to appear and answer the complaint of the plaintiff on file in the office of the above-entitled court, at the City of Nome, Alaska, within thirty (30) days from the service of this summons upon you, or judgment for want thereof will be taken against you;

And you are hereby notified that if you fail to answer the said complaint the plaintiff will apply to the Court for the relief demanded in said complaint.

WITNESS the Honorable CORNELIUS D. MURANE, Judge of said court, and the seal of said

court hereto affixed this 1st day of November, in the year of our Lord one thousand nine hundred and eleven, and of the Independence of the United States, one hundred and thirty-sixth.

[Seal]

J. SUNDBACK,

Clerk of the District Court, District of Alaska, Second Division.

By J. Allison Bruner,

Deputy. [14]

United States of America,  
District of Alaska,  
Second Division,—ss.

I hereby certify that I received the annexed summons on the 18th day of November, 1911, and thereafter on the 20th day of November, 1911, I served the same at Kiana, Alaska, upon Jack Lesamis, Andy Garbin, George Stanley and Sam Salo, by delivering to and leaving with each of them a copy thereof, together with a certified copy of the complaint filed therein. After due and diligent search I was unable to find John Tyapay.

Returned this 24th day of November, 1911.

T. C. POWELL,

United States Marshal.

By C. H. Hawkins,

Deputy.

Marshal's costs: 4 services, \$24.00.

[Endorsed]: No. 2349. In the District Court for the District of Alaska, Second Division. H. Greenberg, Plaintiff vs. Jack Lesamis et al., Defendants. Summons. Filed in the office of the Clerk of the



District Court of Alaska, Second Division, at Nome.  
Dec. 13, 1911. John Sundback, Clerk. By J. Allison Bruner, Deputy. J. H. Hobbes and William A. Gilmore, Attorneys at Law, Nome, Alaska, Attorneys for Plaintiff. 3348 [15]

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*In the District Court for the District of Alaska,  
Second Division.*

No. —.

H. GREENBERG,

Plaintiff,

vs.

JACK LESAMIS, JOHN TYAPAY, ANDY GARBIN,  
GEORGE STANLEY and SAM SALLO.

Defendants.

**Separate Answer of George Stanley and Sam Sallo.**

Come now the defendants George Stanley and Sam Sallo, and for their separate answer to the complaint of the plaintiff, H. Greenberg, herein, admit, deny and alleges as follows:

I.

These answering defendants deny each and every allegation, matter and thing in said complaint alleged, except as hereinafter admitted, qualified or otherwise alleged.

II.

These answering defendants admit that on the 19th day of March, 1910, their codefendants herein, Jack Lesamis, John Tyapay and Andy Garbin,



were the owners of the premises mentioned and described in the said complaint, and that on the day last aforesaid, their said codefendants entered into the agreement and made the conveyance in words and figures set forth in said complaint and upon the considerations expressed in said instruments.

### III.

That on or about the 2d day of Sept. 1911, the [16] defendant, Andy Garbin for a valuable consideration, granted, bargained, sold and conveyed and assigned to the defendant, George Stanley, all his right, title and interest in and to the said premises described in said complaint and in and to all gold dust extracted therefrom, and in and to all claims and demands against the plaintiff Greenberg, arising from the operation and mining of said premises, and in and to all deferred payments due from said Greenberg on account of his purchase of the undivided one-fourth of said premises under the conveyance mentioned in the complaint, and in and to all sums or royalties due or to become due under leases executed by said Garbin and co-tenants of said premises.

### IV.

That on the day last aforesaid, the defendant Jack Lesamis, for a valuable consideration, granted, bargained, sold and conveyed and assigned to the defendant, Sam Sallo, all his right, title and interest in and to the said premises described in said complaint, and in and to all gold-dust extracted therefrom, and in and to all claims and demands against the plaintiff Greenberg, arising from the operation

and mining of said premises, and in to all deferred payments due from said Greenberg on account of his purchase of the undivided one-fourth of said premises under the conveyance mentioned in the complaint, and in and to all sums or royalties due or to become due under leases executed by said Lesamis and cotenants of said premises.

## V.

That under the said agreement, the said plaintiff and the defendants Tyapay, Garbin and Lesamis as copartners under the firm name of Klery Creek Mining Company, mined and [17] operated No. 1, above the Starr Association claim mentioned in the complaint; that the plaintiff, as copartner aforesaid, received the total receipts of said business, being gold-dust extracted from said claim, amounting in all to the sum of \$16,343.43, and paid all the expenses of said business amounting in all to the sum of \$7,788.62, leaving a balance due from said Greenberg to each of the defendants Garbin and Lesamis, of the sum of \$2,138.70.

That by virtue of said conveyance and agreement mentioned in the complaint, the said plaintiff, became and was indebted to each of the defendants Garbin and Lesamis, in a sum equal to one-third of one-fourth of the said gold-dust extracted, to wit, the sum of \$1,361.70, to apply on the purchase money agreed to be paid by said plaintiff under the said conveyance to him.

## VI.

That on or about the 9th day of September, 1910,

the said copartnership was terminated and the books of said partnership closed.

#### VII.

That said plaintiff has not paid to the said Garbin and Lesamis the said amounts so due as aforesaid, except the sum of \$1,333.00 thereof, paid to said Garbin, and except the sum of \$1,000.00 thereof paid to said Jack Lesamis.

#### VIII.

That thereafter, and during the year 1911, the said plaintiff, on his own account and as tenant in common of said premises, operated and mined the said No. 1 Above the Star Association Claim, and extracted from said claim gold-dust of the amount and value of \$8,713.38; that under and by virtue [18] of said agreement and conveyance mentioned in the complaint the said plaintiff became indebted to the said Garbin and Lesamis, and to each of them, in the sum of \$726.12, the same being their share of the one-fourth of the gold-dust extracted from said claim, to be applied on said purchase price to be paid by said plaintiff as hereinbefore mentioned.

#### IX.

That said several amounts so due from said plaintiff to said Garbin and Lesamis were the amounts assigned to these answering defendants, as hereinbefore stated, and said amounts are now due and owing to these answering defendants, to wit, in the aggregate to said George Stanley the sum of \$2,893.-78, with interest on the sum of \$2,167.66 thereof from September 9th, 1910, at the rate of eight per cent per annum, and with interest on \$726.12 thereof

from August 10, 1911, at the rate of eight per cent per annum, and in the aggregate to Sam Sallo, the sum of \$3,226.77, with interest on \$2,500.65 thereof from September 9th, 1910, at the rate of eight per cent per annum, and with interest on \$726.12 thereof from the 10th day of August, 1911, at the rate of eight per cent per annum.

X.

That the plaintiff and the Robertson Magids Company, Robertson-Magids and Company, and Phillip Murphey had notice and knowledge at all times of the matters and things herein alleged; and with such knowledge participated in and entered into the transactions mentioned in the complaint; conniving and conspiring with the plaintiff with the fraudulent intent and design thereby to deprive and defraud these answering defendants and their predecessors in interest of their said [19] properties.

WHEREFORE these answering defendants pray that judgment may be entered in their favor and against the plaintiff for the respective sums due them and each of them, as aforesaid, with interest; that if any accounting be necessary for such purpose, that an accounting be had of all the matters and things in issue between said parties, and that upon such accounting being had, judgment be entered in favor of each of said parties for such sums or sum as such parties shall be entitled to, and against the other of said parties, according to the amounts due from each, and for costs to be taxed



to the prevailing parties herein, and for such other and further relief as to the Court shall seem just.

O. D. COCHRAN,

G. J. LOMEN,

Attorneys for Defendants.

District of Alaska,

Nome Precinct,—ss.

George Stanley, being first duly sworn, deposes and says, that he is one of the defendants named in the foregoing answer, that he has read the same, knows the contents thereof, and that the same is true as he verily believes.

GEO. L. STANLEY.

Subscribed and sworn to before me this the 19th day of December, 1911.

[Seal]

G. J. LOMEN,

Notary Public in and for the District of Alaska.

[20]

Service of a copy of the foregoing Answer this 19th day of Dec., 1911, at — M., admitted.

WILLIAM A. GILMORE,

Of Attorneys for Plff.

[Endorsed]: #2349. No. 2349. In the District Court for the District of Alaska, Second Division. H. Greenberg, Plaintiff, vs. Jack Lesamis, Defendants. Answer of Stanley and Sallo. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Dec. 20, 1911. John Sundback, Clerk. By ———, Deputy. L. O. D. Cochran, G. J. Lomen, *and* Attorneys for Defendants. [21]



*In the District Court for the District of Alaska,  
Second Division.*

No. 2349.

H. GREENBERG,

Plaintiff,

vs.

JACK LESAMIS, JOHN TYAPAY, ANDY  
GARBIN, GEORGE STANLEY and SAM  
SALO,

Defendants.

**Separate Answer of Jack Lesamis, John Tyapay and  
Andy Garbin.**

Come now the defendants Jack Lesamis, John Tyapay, and Andy Garbin, and for their separate answer to the complaint of the plaintiff in the above-entitled action, deny, admit and allege as follows:

I.

Except as hereinafter admitted or qualified, they deny each and every allegation, matter and thing in said complaint contained.

II.

They admit that on the 19th day of March, 1910, they were the owners of the premises mentioned and described in the complaint, and that on said day they entered into the agreement and made the conveyances in said complaint in words and figures set forth, and that the consideration paid and to be paid by the plaintiff for and on account of said agreement and conveyance, were the considerations [22] mentioned in said instruments and none

other; that it was then and there understood and agreed that the provisions in said agreement mentioned, were to be furnished by said plaintiff free and without cost to said defendants, and that the deferred payment of Twenty-four Thousand Dollars mentioned in the said conveyance, was to be paid of the first money taken out of the ground, meaning and intending thereby that the first gold-dust extracted from the premises conveyed, to wit, the undivided one-quarter of the mining claims and property mentioned in said conveyance, was to be applied in payment of said Twenty-four Thousand Dollars; in other words, one-quarter of the gross output of said mining claims mentioned in the complaint, were to be so applied.

### III.

The said defendants admit that the plaintiff paid the Six Thousand Dollars in said agreement and conveyance mentioned, and furnished provisions under said agreement, but defendants allege that said plaintiff, in violation of said agreement, charged up against these answering defendants, certain of said groceries so furnished, to the extent and aggregate amount of \$933.13.

### IV.

Said defendants admit that under and pursuant to said agreement, they and the said plaintiff became and were mining copartners under the name and style of "Klery Creek Mining Company," and during the summer and fall of 1910, they operated as such copartners, one of the claims mentioned in

said conveyance, to wit, No. 1 Above the Star Association Claim on Klery Creek. [23]

## V.

That the partnership above mentioned was for an indefinite term and terminable at the will of any of said partners, and the same was, at the close of the mining season, to wit, the 9th day of September, 1910, in fact dissolved by mutual consent and upon notice of the dissolution thereof given by these answering defendants to said plaintiff.

## VI.

That a partial accounting and settlement of said partnership accounts was then and there had, and the books of said partnership then and there closed; that the total receipts of said partnership consisted of the gold-dust extracted from said No. 1 Above the Star Association Claim, and amounted in the aggregate of \$16,343.43, and that the total expenses of said partnership were in the aggregate \$7,788.62, leaving a balance of net profits of \$8,337.31, and leaving due each of said partners the sum of \$2,138.-70; that under said agreement and conveyance set forth in the complaint, these defendants were, in addition to said net profits, entitled to receive from said plaintiff to be equally divided between them, these answering defendants, one-fourth of said gross receipts above-mentioned, to wit, \$4085.85, and to each of these answering defendants the sum of \$1,361.70.

That said plaintiff received all of said gold-dust, except gold-dust amounting to the value of \$720.00, which last gold-dust was received by one Martin F.

Moran who is still indebted to said partnership therefor. That said plaintiff paid all the expenses of said partnership incurred in said mining operations, and paid to these answering defendants the further sums namely: To John Tyapay \$1,666.00, to Jack Lesamis, \$1,000.00 [24] and to Andy Garbin, \$1,333.00, and no more, leaving the following balance due from said plaintiff to each of these defendants, on account of said partnership transactions and on account of said one-quarter of the gross output of said mining operations, the latter to be applied in reduction of said indebtedness of twenty-four thousand dollars, as follows:

To John Tyapay the sum of \$1,688.90; to Jack Lesamis and his assigns Sam Sallo, \$2,500.65, and to Andy Garbin and his assign George Stanley, \$2,167.65.

## VII.

That on or about the 2d day of Sept., 1911 the defendant Andy Garbin, for a valuable consideration, conveyed to George Stanley, his interest in said mining claims and property, including his interest in said balance of net profits and in said Twenty-four Thousand Dollars due from said plaintiff, and his interest in the royalties under the leases hereinafter mentioned; that the defendant Jack Lesamis on the same day, for a valuable consideration, conveyed to Sam Sallo, his interest in said claims and property, including his interest, in said balance of net profits and in said Twenty-four Thousand Dollars due from said plaintiff, and his interest in royalties under the leases hereinafter mentioned;



that said conveyances were made in good faith without any fraud or collusion whatever.

## VIII.

That the said Stanley and Sallo, by reason of the said conveyances and assignments to them made as aforesaid, are now entitled to have and receive from the said plaintiff the said moneys so assigned to them as aforesaid, and that said defendant Tyapay is entitled to the said balance due him as above [25] specified.

## IX.

That during the year 1911, the plaintiff, as a tenant in common with these answering defendants, and on his own account, mined and operated said No. 1 Above the Star Association Claim on Klery Creek, and extracted from said claim and converted to his own use, gold-dust of the amount and value of \$8,713.36; that if said gold-dust was extracted and said mining done at a loss to said plaintiff, such loss did not, as the defendants are informed and believe, exceed the sum of \$15,861.61; that under said agreement and conveyance mentioned in the complaint became and is now indebted to these defendants and their assigns Stanley and Sallo, above-mentioned, in a sum equal to one-fourth of all of said gold-dust so extracted, to wit; in the sum of \$2,178.35, that is to say, to said Tyapay \$726.12; to said Stanley \$726.12 and to said Sallo \$726.12.

## X.

That these answering defendants are the owners of the Star Association placer mining claim in the Noatak-Kobuk Recording District, District of



Alaska, and that as such owners they are entitled to certain gold-dust extracted from said claim, to wit,  $89\frac{1}{2}$  oz.  $3\frac{1}{2}$  dwt., of gold-dust of the value of \$1,629.94; that said plaintiff, on or about the 1st day of September, 1911, took possession of said gold-dust without authority or consideration therefor, and converted the same to his own use, to the damage of these answering defendants in the sum of \$1,629.94; that by reason of the premises the plaintiff is now indebted to these answering defendants and their assigns Stanley and Sallo, in the sum of \$8,955.50, [26] with interest on \$5,639.71 thereof from the 9th day of September, 1910, at the rate of eight per cent per annum, and with interest on the sum of \$2,178.35 thereof from the 10th day of August 1911, at the rate of eight per cent per annum; and on \$1,629.94 thereof from September 1st, 1911, at the rate of eight per cent per annum.

## XI.

These answering defendants admit that on or about the 24th day of October, 1911, one Phillip Murphey, claiming to be the assignee of Robertson Magids Company, and Robertson Magids & Company, of certain accounts of the alleged aggregate amount of \$17,124.00, began an action at law against these answering defendants, and the plaintiff herein, to recover said amount with interest and costs and sued out a Writ of Attachment in said action; that said attachment has been levied upon certain of the properties mentioned in the complaint and in the conveyances above-mentioned, but the defendants allege that the accounts so assigned to said Phillip

Murphey and so sued upon as aforesaid, were the accounts incurred by the plaintiff Greenberg, in his mining operations during the year 1911 above-mentioned, and were for expenses in said mining operations; that said accounts and expenses were caused, by said plaintiff, to be fraudulently charged against the Klery Creek Mining Company above mentioned, and were fraudulently caused to be assigned to said Phillip Murphey, and said action was collusively and fraudulently caused by said plaintiff to be instituted and said attachment to be levied with the fraudulent intent and purpose on the part of said plaintiff of cheating and defrauding these defendants of their said properties. That with full knowledge on the part of said [27] Robertson Magids Company and Robertson Magids & Company and said Phillip Murphey, of the rights and interests of the defendants herein, and of the said fraudulent intent and purpose on part of said plaintiff, the said Robertson Magids Company the said Robertson Magids & Company, and the said Phillip Murphey aided, connived and conspired with said plaintiff in said fraudulent acts, purposes and intent aforesaid.

That plaintiff is a merchant and operator of large means owning many mercantile concerns and branch stores in various places in Alaska, and is the President and principal stockholder of the Robertson Magids Company and the principal number of said Robertson Magids and Company and that said Phillip Murphey is one of his agents and employees in said businesses, and is the agent and attorney in fact of said plaintiff, and as such attorney in fact,

authorized to transact all manner of business for and on behalf of said plaintiff.

That said plaintiff, as a tenant in common of the said defendants herein, and not otherwise, during the year 1911, operated and mined upon that certain mining claim known as No. 1 Above the Star Association claim; that said operation and mining was fraudulently conducted by said plaintiff, in the name of the Klery Creek Mining Company, when in fact, as the plaintiff the said Robertson Magids Company, the said Robertson Magids and Company and said Phillip Murphey then and there and at all times well knew, said mining was done and said claim was operated by and for the sole use and benefit of the plaintiff, except in so far as the said plaintiff was liable to account to his cotenants for their share of the net profits of said mining and operation, if any. [28]

That plaintiff fraudulently caused to be charged against said Klery Creek Mining Company, the expenses of said mining and operation during the year 1911, including the items embraced within the accounts assigned to said Phillip Murphey, above-mentioned, being accounts assigned to said Murphey mentioned in the complaint.

That said plaintiff fraudulently caused said accounts, without consideration paid therefor, as defendants are informed and believe, to be assigned to said Murphey and thereafter caused said action to be brought and said attachment to be issued and levied as aforesaid.

That the plaintiff herein, is, as defendants are in-

formed and believe, the real party in interest in said action so instituted by said Phillip Murphey. That said Murphey received and now holds the assigned accounts mentioned, upon and under a secret and fraudulent trust for the use and benefit of the plaintiff Greenberg, and under such trust prosecutes said action and attachment as a part of the said scheme of the said plaintiff to defraud the defendants herein of their said mining claims and property.

## XII.

These defendants further allege that the only indebtedness of the Klery Creek Mining Company is a small account in favor of S. B. Marshal and Kay-hill in the sum of \$2.50, and that these defendants are abundantly able to pay the same.

That the assets of said partnership, the Klery Creek Mining Company, is the indebtedness of said plaintiff Greenberg to the defendants herein and on account of \$720.00 due from Martin F. Moran.  
[29]

## XIII.

These answering defendants admit that on August 10th, 1911, certain leases of a number of said mining claims belonging to said plaintiff and these answering defendants were made and executed; but these defendants allege that said leases were executed by said owners as tenants in common of said mining claims, and not by the Klery Creek Mining Co.

WHEREFORE these defendants pray that an accounting be had between said parties and that in such accounting an account be also made of the



amounts due from said plaintiff to the defendants on account of moneys due under said purchase money contract above mentioned, and of all other matters and things growing out of said partnership or matters connected therewith, and that judgment be entered in favor of the parties thereto entitled for such amounts as may be due from the parties each to the other, and for their costs and disbursements herein, and for such other and further relief as to the Court shall seem just.

O. D. COCHRAN,

G. J. LOMEN,

Attorneys for Defendants.

District of Alaska,

Nome Precinct,—ss.

Andy Garbin, being first duly sworn, deposes and says:

That he is one of the defendants named in the foregoing answer, that he has read the same, knows the contents thereof, and that the same is true as he verily believes.

ANDY GARBIN.

Subscribed and sworn to before me this the 19th day of December, 1911.

[Seal]

G. J. LOMEN,

Notary Public in and for the District of Alaska.

[30]

Service of a copy of the foregoing Answer this 19th day of Dec. 1911, at — M., admitted.

WILLIAM A. GILMORE,

Of Attorneys for Plff.



[Endorsed]: No. #2349. In the District Court for the District of Alaska, Second Division. H. Greenberg, Plaintiff, vs. Jack Lesamis et al., Defendants. Answer of Garbin, Tyapay and Lesamis. Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Dec. 20, 1911. John Sundback, Clerk. By ———, Deputy. L. O. D. Cochran, G. L. Lomen, Attorneys for Defendants, Nome, Alaska. [31]

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*In the District Court for the District of Alaska,  
Second Division.*

No. 2349.

H. GREENBERG,

Plaintiff,

vs.

JACK LESAMIS, JOHN TYAPAY, ANDY GAR-  
BIN, GEORGE STANLEY and SAM SALO,  
Defendants.

**Reply to Separate Answer of Jack Lesamis, John  
Tyapay and Andy Garbin.**

Comes now the plaintiff and for reply to the separate answer of Jack Lesamis, John Tyapay and Andy Garbin, admits, denies and alleges as follows:

I.

Replying to paragraph II of said answer, plaintiff denies the affirmative allegations thereof, and specifically denies that it was ever the meaning or intention of the agreement mentioned in said paragraph, as stated in said paragraph, or any other meaning or

intention than that stated in plaintiff's complaint.

## II.

Replying to paragraph III of said answer, plaintiff denies that he charged up against the said defendants certain groceries to the extent and amount of Nine Hundred Thirty-three Dollars and Thirteen Cents (\$933.13) in violation of the said agreement or at all. [32]

## III.

Replying to paragraph V of said answer, plaintiff denies that the said partnership was terminable at the will of any of said partners, or that said partnership was, on the 9th day of September, 1910, dissolved by mutual consent, or otherwise, or at all.

## IV.

Answering paragraph VI of said answer, plaintiff denies that any partial account or settlement of said partnership accounts was on said 9th day of September, 1910, made or attempted to be made, or that the books of said partnership were then and there closed or attempted to be closed; and said plaintiff further denies all of the material affirmative allegations of said paragraph, and the whole thereof, except that he admits that one Martin F. Moran is still indebted to said partnership for gold received and that the plaintiff in the fall of 1910, paid to the defendant John Tyapay Sixteen Hundred and Sixty-six Dollars (\$1666.00), and to the defendant Jack Lesamis the sum of One Thousand Dollars (\$1,000.00) and to the defendant Andy Garbin the sum of Thirteen Hundred and Thirty-three Dollars (\$1333.00), which said sums were paid from the profits of the mining

operations of said copartnership for the year 1910, and which were paid and intended to be paid to said defendants and each of them to apply on the said balance payment of Twenty-four Thousand Dollars (\$24,000.00) mentioned in said partnership agreement described in plaintiff's complaint.

And plaintiff particularly denies that at said time [33] or any other time there was a balance due to any of the said defendants from the gross output or net output of the operations of any of said partnership property in the sum mentioned in said paragraph or in any sums, or at all.

#### V.

Replying to paragraph VII of said answer, plaintiff denies that the said Andy Garbin for a valuable consideration conveyed his interest in said mining claims and property to the defendant George Stanley, or that he made the assignment alleged therein to the said Stanley for a valuable consideration; or that the said defendant Jack Lesamis on said date, or at any time for a valuable consideration conveyed his interests in said partnership to the defendant Sam Salo or made the assignments therein alleged to the said Sam Salo for a valid consideration; and plaintiff alleges that said conveyances and assignments were made as alleged in plaintiff's complaint.

#### VI.

Replying to paragraph VIII of said answer, plaintiff denies that the said defendants Stanley and Salo are now or at any time have been entitled to receive from the plaintiff, or from the said partnership, any

of said partnership property or moneys due thereunder.

## VII.

Replying to paragraph IX of said answer, plaintiff denies each and every allegation, matter and thing therein contained and the whole thereof and particularly denies that he [34] is indebted to the defendants in any sum or sums whatsoever.

## VIII.

Replying to paragraph X of said answer, plaintiff denies each and every allegation, matter and thing therein contained and the whole thereof, and particularly denies that he is indebted to the defendants in the sums therein named, or in any other sums whatsoever.

## IX.

Replying to paragraph XI of said answer, plaintiff denies that the said accounts assigned to one Philip Murphy, mentioned in said paragraph, were fraudulently charged against the said Klery Creek Mining Company, or fraudulently assigned to said Philip Murphy, or that said action was collusively or fraudulently caused to be instituted, or that said action was brought for the purpose of cheating or defrauding the defendants, or that the said Robinson-Magids & Co., and the said Philip Murphy ever aided, connived and conspired in any way as alleged in said paragraph.

Plaintiff admits that he is one of the copartners of the firm of Robinson, Magids & Co., and that said Philip Murphy is one of the agents and employees



of said company, and the agent and attorney in fact of the plaintiff.

Plaintiff denies that during the year 1911, the plaintiff, as a tenant in common with the said defendants, operated and mined on that certain placer mining claim known as No. 1 Above Star Association claim, or that said operations and mining was fraudulently conducted by the plaintiff in the name of the Klery Creek Mining Company. [35]

Plaintiff denies that he ever fraudulently caused to be charged against said Klery Creek Mining Company the expenses of said operations, but alleges that all of the expenses of the operations conducted during the said year 1911 on said ground, was the expense and cost of said Klery Creek Mining Company as alleged in said complaint.

Plaintiff denies that he fraudulently caused said accounts to be assigned to the said Philip Murphy, but alleges that said assignment was made in good faith by said Robinson, Magids & Co., for the purpose of collection.

And plaintiff further denies that the said Murphy now holds the said assigned accounts now sued upon under any agreed or fraudulent trust for the use and benefit of the plaintiff, Greenberg, or at all, but plaintiff alleges that said suit was brought in good faith for the purpose of collecting said accounts, which are justly and legally due to the said Robinson, Magids & Co.

## X.

Replying to paragraph XII of said answer, plaintiff denies each and every allegation, matter and



thing therein contained.

XI.

Replying to paragraph XIII of said answer, plaintiff denies that the leases mentioned in said paragraph were ever executed by the defendants as tenants in common or otherwise, or in any other manner than as members of the Klery Creek Mining Company. [36]

WHEREFORE, plaintiff having fully replied to the answer of the defendants, prays for the relief demanded in his complaint.

WILLIAM A. GILMORE and  
J. F. HOBBS,  
Attorneys for Plaintiff.

United States of America,  
District of Alaska,—ss.

H. Greenberg, being first duly sworn, deposes and says:

That he has heard read the above and foregoing reply, knows the contents thereof and the same is true as he verily believes.

H. GREENBERG.

Subscribed and sworn to before me this 8th day of August, A. D. 1913.

[Seal]

L. W. HAYDEN,  
Notary Public in and for the District of Alaska.

My commission expires October 13, 1913. [37]

Service of the above and foregoing reply admitted by receipt of copy this 8 day of August, 1913.

G. J. LOMEN,  
Of Attorneys for Defendants.

[Endorsed]: No. 2349. In the District Court for the District of Alaska, Second Division. H. Greenberg, Plaintiff, vs. Jack Lesamis et al., Defendants. Reply to Separate Answer of Jack Lesamis, Jack Tyapay and Andy Garbin. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Aug. 8, 1913. John Sundback, Clerk. By ———, Deputy. William A. Gilmore, Attorney at Law, Nome, Alaska, Attorney for Plaintiff. [38]

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*In the District Court for the District of Alaska,  
Second Division.*

No. 2349.

H. GREENBERG,

Plaintiff,

vs.

JACK LESAMIS, JOHN TYAPAY, ANDY GARBIN,  
GEORGE STANLEY and SAM  
SALLO,

Defendants.

**Reply to Separate Answer of George Stanley and  
Sam Sallo.**

Comes now the plaintiff and for reply to the separate answer of defendants George Stanley and Sam Sallo, admits, denies and alleges as follows:

I.

Replying to paragraph III of said answer, plaintiff denies that the conveyances and assignments mentioned and described in said paragraph were ever

made for a valuable consideration or any consideration whatever.

## II.

Replying to paragraph IV of said answer, plaintiff denies that the conveyances and assignments mentioned and described in said paragraph IV were ever made for any valuable consideration, or any consideration at all.

## III.

Replying to paragraph V of said answer, plaintiff [39] denies each and every allegation, matter and thing therein contained and the whole thereof, and particularly denies that the plaintiff is indebted to defendants in the sum or sums mentioned in said paragraph, or in any sum or sums whatsoever.

## IV.

Replying to paragraph VI of said answer, plaintiff denies that on the 9th day of September, 1910, or any other time, said copartnership was terminated or that the books of said partnership were closed.

## V.

Replying to paragraph VII of said answer, plaintiff admits that he paid the sums mentioned therein to Garbin and Lesamis, but denies each and every other allegation, matter and thing therein contained.

## VI.

Replying to paragraph VIII of said answer, plaintiff denies each and every allegation, matter and thing therein contained and the whole thereof.

## VII.

Replying to paragraph IX of said answer, plaintiff denies each and every allegation, matter and

thing therein contained, and the whole thereof, and particularly denies that he is indebted to the defendants in the sum or sums mentioned in said paragraph, or in any other sum or sums whatsoever.

VIII.

Replying to paragraph X of said answer, plaintiff [40] denies each and every allegation, matter and thing therein contained and the whole thereof.

WHEREFORE, plaintiff having fully replied to the answer of the said defendants, Stanley and Sallo, prays for the relief demanded in his complaint.

WILLIAM A. GILMORE and  
J. F. HOBBS,

Attorneys for Plaintiff.

United States of America,  
District of Alaska,—ss.

H. Greenberg, being first duly sworn, deposes and says :

That he is the plaintiff in the above-entitled action; that he has heard read the above and foregoing reply, knows the contents thereof and the same is true as he verily believes.

H. GREENBERG.

Subscribed and sworn to before me this 8th day of August, A. D. 1913.

[Seal]

L. W. HAYDEN,

Notary Public in and for the District of Alaska.

My commission expires Oct. 13, 1913. [41]

Service of the above and foregoing reply acknowledged by receipt of copy this 8th day of August, 1913.

G. J. LOMEN,  
Of Attorneys for Defendants.

[Endorsed]: No. 2349. In the District Court for the District of Alaska, Second Division. H. Greenberg, Plaintiff, vs. Jack Lesamis et al., Defendants. Reply to Separate Answer of George Stanley and Sam Sallo. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Aug. 8, 1913. John Sundback, Clerk. By ———, Deputy. William A. Gilmore, Attorney at Law, Nome, Alaska, Attorney for Plaintiff. [42]

*In the District Court for the District of Alaska,  
Second Division.*

No. —.

H. GREENBERG,

Plaintiff,

vs.

JACK LESAMIS, JOHN TYAPAY, ANDY GARBIN,  
GEORGE STANLEY and SAM  
SALLO,

Defendants.

**Supplemental Answer and Cross-complaint.**

Come now the defendants George Stanley and Sam Sallo, and for their supplemental answer and for a cross-complaint herein, allege:

I.

That said action was commenced in this court on



the 1st day of November, 1911, by the filing of the complaint with the Clerk of said Court, and the issuing of a summons thereon.

That on the 20th day of December, 1911, the defendants above named filed their answer in said action, the said defendants, Stanley and Sallo filing a joint answer.

That said action is brought for the dissolution of an alleged mining copartnership, and for an accounting.

## II.

That since the commencement of said action and the joining of issue therein, the plaintiff has neglected and refrained from mining or operating the mining claims mentioned in the complaint, and from extracting gold therefrom, or from [43] any or any part of said claims, and has neglected and refused to pay to the defendants the sum of Twenty-four Thousand dollars (\$24,000.00), the balance of the purchase price agreed by him to be paid according to the terms of the contract and conveyance set forth in the complaint herein.

## III.

That it was understood and agreed by the plaintiff and the defendants, parties to the contract and deed of conveyance mentioned in the complaint, and it was contemplated in and by said contract and conveyance that the plaintiff should and would, with reasonable diligence, operate and mine the premises described in the complaint and extract gold therefrom; and that out of the first money taken out of the ground purchased, to wit, the undivided

one-fourth ( $\frac{1}{4}$ ) of said premises, and meaning and intending the first or gross amount of gold-dust extracted therefrom, he, the said plaintiff, would and should pay to the grantors in said conveyance the said sum of Twenty-four Thousand Dollars (\$24,000.00).

And it was further understood and agreed by and between the parties to the said contract and conveyance mentioned in the Complaint, that said Twenty-four Thousand Dollars should and would be paid within a reasonable time; that more than a reasonable time has long since elapsed.

#### IV.

That since issue joined in said action a part of said claims have been mined by third persons under leases given by plaintiff and defendants, on a royalty basis; that the plaintiff has collected and received from said lessees one-half ( $\frac{1}{2}$ ) of said royalties amounting to the sum of [44] Twelve Hundred and Twenty-six and  $\frac{38}{100}$  Dollars but that plaintiff has neglected and refused to pay said royalties so received by him, or any part thereof, in liquidation of said Twenty-four Thousand Dollars, or any part thereof, and has neglected and refused to account to the said defendants or any of them, for the royalties so received, or any part thereof.

#### V.

That during the years 1911, 1912, and in each of said years, the defendants Stanley and Sallo duly performed the assessment work on each of the following claims mentioned in the complaint, to wit:

“1 and 2 Above Discovery on Bear Creek; The Rich Association on Bear Creek; the Central Association, 1 Below and 1 and 2 Above on Central Creek; Discovery Claim on Jack Creek and Rocky Association Rock Creek; in 1912 also on the No. 6 Below on Klery Creek and California Association; and in 1913 also on the No. 2 Above on Klery Creek; said Rocky Association, Discovery on Jack Creek and Fraction between Discovery and Star Association; said assessment work being of the value of, and aggregating in all the sum of Twenty-four Hundred Dollars (\$2400.00).”

That said plaintiff has neglected and refused to pay or contribute his proportion of said assessment work, to wit one-half ( $\frac{1}{2}$ ) thereof, to wit, One Thousand Two Hundred Dollars, (\$1,200.00) or any part thereof.

## VI.

That on or about the 13th day of August, 1911, the defendant Andy Garbin, for valuable consideration, conveyed to the defendant Stanley, his interest in the premises described in the complaint, and assigned to said Stanley, his interest in the profits of said premises and in said Twenty-four Thousand Dollars due from said plaintiff, and his interest in all royalties due under the leases above mentioned; and that on the same day defendant Jack Lesamis, for a valuable consideration, conveyed to the defendant Sallo, his interest [45] in said premises and assigned his interest in the profits of said premises and

in said Twenty-four Thousand Dollars due from said plaintiff, and his interest in all royalties under the leases above mentioned.

## VII.

That by reason of the premises there is now due and owing from plaintiff to the defendants Stanley and Sallo, on account of the said purchase money agreed to be paid by plaintiff for said undivided one-fourth ( $\frac{1}{4}$ ) of said premises, two-thirds of the sum of Twenty-four Thousand Dollars (\$24,000.00); to wit, \$18,000.00. That there is due from said plaintiff to said defendants Stanley and Sallo on account of assessment work performed by them above mentioned, the sum of One Thousand Two Hundred Dollars.

WHEREFORE defendants Stanley and Sallo pray that they have and recover judgment against plaintiff H. Greenberg, for the sum of Nineteen Thousand and Two Hundred Dollars, in addition to all money due them from said plaintiff on the accounting to be had in this action, and for such other and further relief as to the Court may seem just and proper, and for their costs and disbursements herein.

O. D. COCHRAN,  
G. J. LOMEN,

Attorneys for Defendants Stanley and Sallo. [46]  
United States of America,  
District of Alaska,—ss.

Geo. Stanley, being first duly sworn, deposes and says: That he is one of the defendants named in the foregoing supplemental answer and cross-complaint;



that he has read the same, knows the contents thereof, and that the same is true as he verily believes.

GEO. L. STANLEY.

Subscribed and sworn to before me this the 8th day of August, 1913.

[Seal]

G. J. LOMEN,

Notary Public in and for the District of Alaska.

My comm. expires June 27, 1917.

Service of the within supplemental answer and cross-complaint of defendants Stanley and Sallo is hereby admitted at Nome, Alaska, Aug. 12, 1913.

WILLIAM A. GILMORE,

Of Attys. for Plaintiff.

[Endorsed]: No. 2349. In the District Court for the District of Alaska, Second Division. H. Greenberg, plaintiff, vs. Jack Lesamis, Defendants. Supplemental Answer and Cross-complaint. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Aug. 12, 1913. John Sundback, Clerk. By ———, Deputy. G. J. Lomen and O. D. Cochran, Attorneys for Defendants. [47]



*In the District Court for the District of Alaska,  
Second Division.*

No. —

H. GREENBERG,

Plaintiff,

vs.

JACK LESAMIS, JOHN TYAPAY, ANDY  
GARBIN, GEORGE STANLEY and SAM  
SALLO,

Defendants.

**Reply and Answer to Supplemental Answer and  
Cross-Complaint of Defendants George Stanley  
and Sam Sallo.**

Comes now the plaintiff H. Greenberg, and for reply and answer to the supplemental answer and cross-complaint of defendants George Stanley and Sam Sallo admits, denies and alleges as follows:

I.

He admits the allegations of paragraph I thereof.

II.

Answering paragraph II thereof, plaintiff denies each and every allegation, matter and thing therein contained, and the whole thereof, except as herein-after alleged.

III.

Answering paragraph III thereof, plaintiff denies, each and every allegation, matter and thing therein contained and the whole thereof.

IV.

Answering paragraph IV thereof, plaintiff denies

each [48] and every allegation, matter and thing therein contained and the whole thereof, except that he admits that certain leases were given to third parties on the Klery Creek Mining Company's mining property, and that the plaintiff received a small amount of gold-dust as royalty thereof, which said royalty was applied by the plaintiff in the discharge and payment of the Klery Creek Mining Company's partnership indebtedness.

V.

Answering paragraph V thereof, plaintiff alleges that he has no knowledge or information of the facts therein stated, as to whether or not the defendants Stanley and Sallo did or did not perform the alleged work therein mentioned, and therefore deny the same.

And plaintiff further alleges in answer thereto, that if said Stanley and Sallo did perform the assessment work mentioned therein, that the same was done at the instance and request of the defendants Lesamis and Garbin who were and are members of the Klery Creek Mining Company, owner of said placer claims.

VI.

Answering paragraph VI, plaintiff denies each and every allegation, matter and thing therein contained and the whole thereof save and except that the defendants Andy Garbin and Jack Lesamis pretended to transfer certain interests in real and personal property of the Klery Creek Mining Com-

pany to the defendants Stanley and Sallo, but that the same was done without any consideration whatever.

## VII.

Answering paragraph VII thereof, plaintiff denies [49] each and every allegation, matter and thing therein contained and the whole thereof and particularly denies that there is now due and owing from the plaintiff to the defendants Stanley and Sallo the sums mentioned in said paragraph or any sum or sums whatsoever.

And for an affirmative reply and answer to the supplemental answer and cross-complaint of defendants George Stanley and Sam Sallo, plaintiff alleges as follows:

## I.

That at all times since the 19th day of March, 1910, it was the intention and meaning of the Klery Creek Mining Company, as expressed in the written contract of partnership set forth in plaintiff's complaint in this action, that the plaintiff and the defendants Andy Garbin, Jack Lesamis and John Tyapay, jointly as copartners and not otherwise, should mine and operate the placer claims belonging to said Klery Creek Mining Company described in the plaintiff's complaint and after deducting the expenses of operations from the gross output, from the first profits pay to the said Garbin, Lesamis and Tyapay the said sum of Twenty-four Thousand Dollars (\$24,000.00) and not otherwise.

## II.

That on or about the —— day of September, 1911,

the said defendants Garbin and Lesamis refused to further comply with the terms of the said agreement of copartnership and refused to further mine and operate said claims or assist the plaintiff as a copartner in operating the same, and at all times since said time have contended and claimed that the said copartnership was dissolved. [50]

### III.

That for and because of said refusal of said defendants Garbin and Lesamis to further mine and operate said placer claims as copartners under the terms of said agreement, plaintiff instigated this action for an accounting and dissolution of said copartnership, and the same has been pending trial ever since. That the said defendants George Stanley and Sam Sallo were not parties to the said partnership agreement and were not interested in any way in the formation of said Klery Creek Mining Company, and plaintiff has never at any time recognized the said defendants Stanley and Sallo as copartners in said Klery Creek Mining Company and does not now recognize them as copartners but still contends and claims that the said defendants Lesamis, Garbin and Tyapay are members of said copartnership, and that the plaintiff is entitled to an accounting between himself and said defendants Lesamis and Garbin and Tyapay, under the original terms and conditions of said copartnership agreement, and is also entitled to all other relief prayed for in his original complaint against said defendants.

WHEREFORE plaintiff having fully replied to the supplemental answer and cross-complaint of



said defendants Stanley and Sallo, prays the Court for the relief demanded in his complaint.

J. F. HOBBS and  
WILLIAM A. GILMORE,  
Attorneys for Plaintiff. [51]

United States of America,  
District of Alaska,—ss.

H. Greenberg, being first duly sworn, says: That he is the plaintiff in the above and foregoing action, that he has heard read the above and foregoing reply and knows the contents thereof, and the same is true as he verily believes.

H. GREENBERG.

Subscribed and sworn to before me this 13th day of September, A. D. 1913.

[Seal] WILLIAM A. GILMORE,  
Notary Public in and for the District of Alaska.  
My commission expires July 27, 1915.

Service of above and foregoing reply admitted by copy this 13th day of Sept. 1913.

G. J. LOMEN,  
Of Attys. for Defs.

[Endorsed]: No. 2349. In the District Court for the District of Alaska, Second Division. H. Greenberg, Plaintiff, vs. Jack Lesamis et al., Defendants. Reply and Answer to Supplemental Answer and Cross-complaint of Defendants George Stanley and Sam Sallo. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Sept. 15, 1913. J. Sundback, Clerk. By J. A. B.



Deputy. J. F. Hobbes and William A. Gilmore, Attorneys at Law, Nome, Alaska, Attorneys for Plaintiff. [52]

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*In the District Court for the District of Alaska,  
Second Division.*

H. GREENBERG,

Plaintiff,

vs.

JACK LESAMIS et al.,

Defendants.

**Opinion.**

On November 1st, 1911, plaintiff H. Greenberg filed his petition in this court alleging that on the 19th day of March, 1910, plaintiff and defendants, Jack Lesamis, John Tyapay and Andy Garbin entered in to a copartnership agreement to work and mine certain claims described in the complaint; that said copartnership has never been dissolved; and that plaintiff is entitled to an accounting, and prays that an accounting be had and that the copartnership be dissolved.

Defendants Lesamis, Tyapay and Garbin admit in their answer, that

“they and the said plaintiff became and were mining copartners under the name and style of Klery Creek Mining Co. and during the summer and fall of 1910 they operated as such copartners one of the claims mentioned in said conveyance, to wit: No. One Above the Star Association Claim on Klery Creek,”

but allege that the partnership was dissolved by mutual consent on the 9th day of September, 1910, also allege a conveyance of all their claims and interests to the defendants Stanley and Sallo on the 2d day of September, 1911. The defendants Stanley and Sallo, by their answer, allege that they purchased the interests of Garbin and Lesamis, and are now the owners and have been such owners since September 2d, 1911. Also by their supplemented answer and cross-complaint set up the performance of assessment work on the claims, and allege that the balance of the twenty-four thousand dollars (\$24,000.00) is now due because of plaintiff's failure to work the mining claims with proper diligence.

Plaintiff by reply denies the affirmative matter of the various answers, also the cross-complaint.

From these pleadings it will be seen that the main issues to be decided by the Court are: [53]

First, was the partnership between plaintiff and defendants Lesamis, Tyapay and Garbin, dissolved by mutual consent in September, 1910?

Second, from what fund or proceeds was the balance of the purchase price of twenty-four thousand dollars (\$24,000.00) to be paid?

Third, were the conveyances to Stanley and Sallo valid or void for want of consideration, and if valid, did they take title subject to all obligations of the partnership?

Fourth, are the defendants entitled to credit for expenditures and work done on the claims in controversy to prevent a forfeiture?

The first question should be answered in the negative. All the acts of defendants subsequent to the cessation of operations, in the fall of 1910 up to the time work was closed down in the fall of 1911, were inconsistent with the theory that the partnership had been dissolved in 1910.

In answering the second question, it must be admitted that the deed and contract between plaintiff and defendants were not as explicit as they might be, and if it were not for the interpretation placed upon the instruments by the defendants as indicated by their settlement, in the fall of 1910, and by the subsequent deed executed by two of the defendants, and the general conduct of all of the defendants, the Court would be inclined to construe the contracts to mean that the twenty-four thousand dollar (\$24,000.00) balance of the purchase price should be paid from the proceeds of plaintiff's one-fourth interest, but from the acts of the defendants, it becomes very clear that the intent of the parties was that the balance of the purchase price was to be paid from the net proceeds of the mining claims mentioned in the copartnership agreement and deed.

The third proposition to be passed upon by the Court is made clear by the testimony of the defendants. No consideration passed from the grantee to the grantors and as against the plaintiff, at least, the conveyances are void. Defendants Stanley and Sallo can be no more than trustees for defendants Lesamis and Garbin. In view of the fact that defendants Stanley and Sallo appear to hold the title in trust for Lesamis and Garbin, any work done by

them for the purpose of protecting the title and preventing a forfeiture should be allowed in the final accounting, and plaintiff Greenberg should be [54] required to pay one-fourth of such necessary expenditures.

Plaintiff Greenberg is entitled to an accounting, and the mining claims mentioned in the complaint are liable for the debts of the copartnership.

The copartnership should be dissolved and the assets of the copartnership sold and from the proceeds the costs and expenses of this litigation should first be paid, then the indebtedness of the copartnership, after which the balance of the purchase price agreed to be paid by plaintiff Greenberg, and the balance, if any, should be divided equally between the plaintiff Greenberg and the defendants Lesamis, Tyapay and Garbin, or their assigns.

For the purpose of making findings, the Court suggests that at the close of the mining season of 1910, the defendants Lesamis, Tyapay and Garbin were each entitled to receive the sum of two thousand four hundred and sixty-three dollars and eighty-nine cents (\$2,463.89). Lesamis received one thousand *seventeen* hundred twenty-six dollars (\$1,726.00); Tyapay, two thousand dollars (\$2,000.00); Garbin, one thousand five hundred and twelve dollars and nineteen cents (\$1,512.19). The balance remained on hand and they should each receive credit for the respective amounts to be applied on the next years expense. Said defendants should each pay one-fourth of the 1911 expense, less this credit from the 1910 operations, and plaintiff Greenberg should, after ap-



plying the gross output for that year, be charged with the balance of the expense for the year 1911. It does not appear from the testimony that the plaintiff Greenberg contributed anything towards the expense for the year 1911 except by securing a line of credit with the Robinson-Magids Company, and everything furnished by said company was charged to the Klery Creek Co. and not to the plaintiff Greenberg.

Let findings of fact and conclusions of law be prepared in accordance with this memorandum opinion.

CORNELIUS D. MURANE,

U. S. District Judge.

Dated this 21st day of October, 1913, Nome, Alaska. [55]

[Endorsed]: No. 2349. In the District Court for the District of Alaska, Second Division. H. Greenberg vs. Jack Lesamis et al. Memo. Opinion. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 21, 1913. John Sundback, Clerk. By J. A. B. [56]

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*In the District Court for the District of Alaska,  
Second Division.*

No. 2349.

H. GREENBERG,

Plaintiff,

vs.

JACK LESAMIS, JOHN TYAPAY, ANDY GARBIN,  
GEORGE STANLEY and SAM SALLO,

Defendants.



### **Findings of Fact and Conclusions of Law.**

This cause being an equitable action, having come on regularly to be heard before the Court on the 15th day of September, 1913, and the trial thereof continuing thereafter from day to day to the 19th day of September, 1913, the plaintiff appearing in person and by his attorneys, Messrs. J. F. Hobbes and William A. Gilmore, and the defendants appearing in person and by their attorney, G. J. Lomen, Esq., and witnesses on behalf of the plaintiff and defendants having been sworn and testified, and documentary evidence and depositions on behalf of the parties hereto having been read and introduced in evidence, and the Court having heard the arguments of counsel for the respective parties and having thereafter and on the 21st day of October, 1913, rendered and filed its written opinion herein, and being now fully advised in the premises, makes the following findings of fact and conclusions of law, to wit:

### **FINDINGS OF FACT.**

#### **I.**

The Court finds that heretofore and on the 19th day of March, 1910, and for a long time prior thereto, the defendants, Jack Lesamis, John Tyapay and Andy Garbin were the owners and in the possession of certain placer mining claims situated in the Noatuk-Kobuk Mining and Recording District, District of Alaska, and that legal title to said placer mining claims stood in the names of said defendants by virtue of certain placer locations by them made in said mining district; [57] that on the said 19th day of

March, 1910, the said defendants, Jack Lesamis, John Tyapay and Andy Garbin, entered into certain written instruments whereby and wherein they agreed with the plaintiff to form a copartnership to work and mine the said mining claims, and to give and convey to the plaintiff an undivided one-quarter ( $\frac{1}{4}$ ) interest in all of said placer claims, lode claims and water rights then owned, acquired or to be acquired by said defendants in consideration of the plaintiff furnishing them with provisions from time to time from the said 19th day of March, 1910, to July, 1910, and agreed to pay the defendants the sum of six thousand dollars (\$6,000) in cash and thereafter the further additional sum of twenty-four thousand dollars (\$24,000) from the net profits of said mining operations to be thereafter conducted and had upon said mining claims; that the said agreement between the parties, plaintiff and said defendants, was reduced to writing and incorporated in the following two written instruments, which said instruments were executed, witnessed and delivered between the parties, to wit:

“AGREEMENT.

Klery Creek March 19th, 1910.

Know all men by these presents That we the undersigned John Tyapay Andy Garbin and Jack Lesamis of the Noatak-Kabuk recording District, District of Alaska, and H. Greenberg of Nome Ala. enter into this agreement, that for the sum of one dollar lawful money of the United States in hand paid and other Valuable services, for same services H. Greenberg is, and shall be a full fledged partner

with the above-mentioned parties & have one quarter undivided interest in all claims, lodes, water rights acquired or to be acquired and owned by the above mentioned parties. It is further agreed that H. Greenberg is to furnish the above mentioned parties with Provisions from time to time up till July, 1910.

ANDY GARBIN. (Seal)

JACK LESAMIS. (Seal)

JOHN TYAPAY. (Seal)

H. GREENBERG.

Witnesseth:

SAM MAGIDS.

HERMAN BERNHARDT." [58]

"This indenture made the 19th day of March in the year of our Lord one thousand nine hundred and ten between the undersigned Andy Garbin, Jack Lesamis and John Tyapay of the Noatak-Kobuk Recording District, of the District of Alaska parties of the first part and H. Greenberg of Nome, Alaska party of the second part witness, That the said parties of the first part, for and in consideration of the sum of Thirty thousand dollars (\$30000.00)

Six thousand dollars (\$6000.00) in lawful money of the United States of America to them in hand paid by said party of the second part, the receipt whereof is hereby acknowledged, and the balance of twenty four thousand to be paid of the first money taken out of the ground hath, granted, bargained, sold, remised, released, and forever quit-claimed and by these presents doth grant, bargain, sell, remise release and forever quitclaim unto the said party of the second part, his heirs and assigns one quarter ( $\frac{1}{4}$ ) un-

divided of all mining claims located surveyed, recorded and held by said Parties of the first part situated in Noatak-Kobuk mining district district of Alaska together with all the dips, spurs and angles and also the metals, ores, gold and silver bearing quartz, rock and earth therein, and all the rights, privileges and franchises thereto incident, appendent and appurtenant or therewith usually had or enjoyed; and also all and singular the tenements, hereditaments and appurtenances, thereunto belonging, or in any wise appertaining, and the rents issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well as in law as in equity, of the said party of the first part, of in or to the said premises and every part or parcel thereof, with appurtenances.

To have and to hold, all and singular, *he* said Premises, together with the appurtenances and privileges thereto incident, unto the said party of the second part his heirs and assigns forever warranting and defending the same against the claims of all persons, save and except the United [59] States.

ANDY GARBIN. (Seal)

JACK LESAMIS. (Seal)

JOHN TYAPAY. (Seal)

Witnesseth:

SAM MAGIDS.

HERMAN BERNHARDT."

## II.

The Court finds that thereafter and at all times since said 19th day of March, 1910, plaintiff has fulfilled and carried out the terms, covenants and condi-



tions on his part to be done, made, kept and performed, and did furnish the defendants with the provisions mentioned in said written instrument and did pay to the defendants the sum of \$6,000.00 in lawful money of the United States, and the said defendants thereupon and in pursuance of the terms of said written instrument, entered into the mining copartnership known, named and called the Klery Creek Mining Company, and thereupon began mining operations upon said placer claims heretofore referred to and hereafter named and set forth.

### III.

The Court finds that at the time said instruments were executed and delivered and at the time said mining copartnership was formed, the said defendants Jack Lesamis, John Tyapay and Andy Garbin, were the owners and in the possession of the following placer mining claims, to wit:

Discovery Claim, One Above Discovery, Two Above Discovery, Six Below Discovery, Fraction between Two and Three Above Discovery, Association Fraction between Discovery and Starr, California Association, L. L. Klery Creek opposite Discovery, Butte Association, R. L. Klery Creek opposite Discovery, Oregon Association (Bench and Creek) adjoining upper and Starr, and lower end of 1 and 2 Above Discovery, Bench Seven, opposite Creek Claim Seven Below Gold Hill Association R. L. opposite 1, 2, 3 and 4 Creek Claims. All the foregoing claims being situated on Klery Creek, or its benches; also Honey claims, one and two, between Klery and Bear Creeks, Northpole Association L. L. adjoining



claims, last above described, One and Two Above Discovery, on Bear Creek, Goldfield Association opposite 1 and 2 Above and 1 Below L. L. Bear [60] Creek, Rich Association on Bear Creek, and adjoining 2 Above Central Association, adjoining No. 1 Below on Central Creek Discovery on Central Creek. One Above on Central Creek, One Below on Central Creek, Fraction (Garbin) on Central Creek, Discovery Claim on Jack Creek, a tributary of Klery; all interest of said first party in all mining claims owned in whole or in part in Rocky Creek, in said mining and recording district.

And the Court further finds that all of said mining claims were put into said mining copartnership as assets by said defendants, and thereupon the said Klery Creek Mining Company entered into possession of said claims and began to mine and operate the same as a mining copartnership; that thereafter the said Klery Creek Mining Company operated said mining claims on said Klery Creek and vicinity, in the Noatuk-Kobuk Recording District, between the said 19th day of March, 1910, and the first day of September, 1911; that during said term and time said mining claims were operated at a loss to said mining copartnership of \$16,484.82, and that said indebtedness is due with legal interest to date, to Robinson-Magids & Company, or its assignee, for goods, wares and merchandise and for money advanced and paid out at the request of said Klery Creek Mining Company.

#### IV.

The Court finds that on or about the first day of

September, 1911, the said Klery Creek Mining Company executed several written leases upon several of the said mining claims above mentioned belonging to the said Klery Creek Mining Company, for the purpose of having said mining claims mined during the winter of 1911, under all of which leases certain stipulated royalties were reserved to be paid to the said mining copartnership

V.

The Court finds that theretofore and on or about the first day of September, 1911, the defendants Andy Garbin and Jack Lesamis, in violation of the terms and conditions of the said copartnership agreement, conveyed, without consideration, [61] to defendants George L. Stanley and Sam Sallo, all of their right, title and interest in the said Klery Creek Mining Company copartnership property, real and personal, and the Court finds that said conveyances were void as against the plaintiff and the creditors of said Klery Creek Mining Company, and that said defendants, Stanley and Sallo are trustees for defendants Garbin and Lesamis.

VI.

The Court finds that the said written instruments executed and delivered as above set forth were thereafter recorded in the office of the Noatuk-Kobuk Recording District, on the 29th day of March, 1910, and the said defendants George L. Stanley and Sam Sallo took and received the said transfers of title from the said defendants Andy Garbin and Jack Lesamis, with full knowledge and notice of the said copartnership and with full knowledge and notice of

the fact that the said Klery Creek Mining Company had outstanding indebtedness at said time of the sum of \$16,484.82, incurred in mining operations theretofore conducted.

#### VII.

The Court finds that all of said royalties due or collected from the placer claims above described and set forth belonged to the Klery Creek Mining Company.

#### VIII.

The Court finds that heretofore and on the 24th day of October, 1911, one Philip Murphy, claiming an assignment of the account of Robinson-Magids & Company, creditors of said Klery Creek Mining Company, began an action at law in the above-entitled court, for the collection of \$17,124.00 and interest, against the said Klery Creek Mining Company, and caused to be issued a writ of attachment against the mining property of said Klery Creek Mining Company; that the indebtedness of the said Klery Creek Mining Company to the said Philip Murphy, assignee of said Robinson-Magids & Company, should be paid from the first proceeds of the assets and property of said Klery Creek Mining Company, after the [62] expenses of this litigation is settled, and before any balance sum due the said defendants is paid, from the proceeds or assets of said mining copartnership.

#### IX.

The Court finds that owing to the acts and actions of the defendants, it is impossible for the plaintiff and said defendants to further act and conduct the mining copartnership in the management and workings of said mining copartnership property and min-

ing claims; that said defendants Stanley, Sallo, Garbin, Lesamis and Tyapay, are all insolvent and have no other property of value other than their interest in said copartnership property, and that the assets of the said Klery Creek Mining Company consists of said mining claims above described, and certain personal property incident thereto and upon said mining claims, and that the said Klery Creek Mining Company has no money or other property except the said placer claims and personal property therewith connected to pay its indebtedness.

#### X.

The Court finds that the total gold production of 1910 of said Klery Creek Mining Company was \$16,251.42, and that the total expense of the said Klery Creek Mining Company for 1910 was \$8,959.75, leaving a net profit of \$7,391.67, of which the said defendant Jack Lesamis received \$1,726.00; John Tyapay, \$2,000.00 and Andy Garbin, \$1,512.19, and the said Lesamis had a credit for 1911 of \$737.89, and the said John Tyapay had a credit of \$463.89, and the said Andy Garbin had a credit of \$951.70.

That the total expense for the year 1911 was \$26,271.70 and the total gold production for the year 1911 amounted to \$9,786.88, leaving an indebtedness due the Robinson-Magids & Company or its assignee, Philip Murphy, of \$16,484.82 on the first day of September, 1911, with legal interest to date, amounting to \$2,830.12; that the Court further finds that the defendants in the years 1911 and 1912, in order to prevent a forfeiture, did the annual assessment work on certain claims [63] mentioned in paragraph V



of the supplemental answer and cross-complaint of defendants Stanley and Sallo, of the total value of \$2,400.00, and that said amount is chargeable as indebtedness against the said Klery Creek Mining Company, and the defendants are entitled to be credited with the same.

## XI.

The Court finds that the total indebtedness of said Klery Creek Mining Company, due to said Robinson-Magids & Company, or its assignee, Philip Murphy, with legal interest to date, amounts to \$19,314.94, and that each of the said partners would be indebted to the said Klery Creek Mining Company for the sum of \$4,828.73 less the credits above mentioned, and that the said defendant Lesamis is indebted to the said Klery Creek Mining Company in the sum of \$4,429.-21; that the said defendant Tyapay is indebted to the Klery Creek Mining Company in the sum of \$4,703.21; that the said defendant Garbin is indebted to the said Klery Creek Mining Company in the sum of \$4,215.40; that the plaintiff Greenberg is indebted to the Klery Creek Mining Company in the sum of \$5,967.10.

## XII.

The Court finds that it was the intent and meaning of the parties in forming said copartnership that the balance payment of \$24,000 was to be paid from the net profits from the mining operations of the copartnership property, and that the defendants Jack Lesamis, Andy Garbin and John Tyapay have received on the said sum of \$24,000 the tital sum of \$5,238.19, leaving a balance due to said defendants



or their assigns from the net profits, the sum of \$18,761.81.

### XIII.

The Court finds that the allegations contained in the answers of the defendants that said balance payment was due from the first gold-dust extracted and taken from the undivided one-quarter ( $\frac{1}{4}$ ) interest in said mining property, is not supported by the evidence, and is untrue.

### XIV.

The Court further finds that all allegations in the answers of the defendants and in their supplemental answer [64] and cross-complaint inconsistent with the above and foregoing findings are not supported by the evidence in the case and are untrue.

### CONCLUSIONS OF LAW.

And from the obove and foregoing findings of fact, the Court now makes the following:

### CONCLUSIONS OF LAW.

#### I.

That the plaintiff, Greenberg, is entitled to an accounting and the mining claims and personal property situated thereon, mentioned in the complaint, are liable for the debts of the copartnership; that the copartnership should be dissolved and the assets of the copartnership sold and from the proceeds the costs and expenses of this litigation should be paid, then the indebtedness of the copartnership after which the balance of the purchase price agreed to be paid by the plaintiff, Greenberg, should be paid, and the balance, if any, of said proceeds should be

equally divided between the plaintiff, Greenberg, and the defendants, Lesamis, Tyapay and Garbin, or their assigns.

II.

That the plaintiff, Greenberg, is entitled to a final decree of this Court dissolving the said copartnership and directing the sale of the assets thereof, and the application of the proceeds of said assets to the payment of the indebtedness of said copartnership, and the distribution of the same, as above provided.

Done in open court this 28 day of October, 1913.

CORNELIUS D. MURANE,

District Judge.

Service of foregoing findings and conclusions admitted by receipt of a copy this 24th day of Oct. 1913.

G. J. LOMEN,

Attys. for Defs. [65]

[Endorsed]: No. 2349. In the District Court for the District of Alaska, Second Division. H. Greenberg, Plaintiff, vs. Jack Lesamis et al., Defendants. Findings of Fact and Conclusions of Law. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 28, 1913. John Sundback, Clerk. By J. A. B., Deputy. J. F. Hobbes and William A. Gilmore, Attorneys at Law, Nome, Alaska, Attorneys for Plaintiff. Vol. 10, Orders and Judgments, p. 359, C. [66]

*In the District Court for the District of Alaska,  
Second Division.*

No. 2349.

H. GREENBERG,

Plaintiff,

vs.

JACK LESAMIS, JOHN TYAPAY, ANDY  
GARBIN, GEORGE STANLEY and SAM  
SALLO,

Defendants.

**Decree.**

This cause came on regularly to be heard before the Court without a jury, on the 15th day of September, 1913, and the trial thereof continued from day to day until the 19th day of September, 1913, the plaintiff appearing in person and by his attorneys, Messrs. J. F. Hobbes and William A. Gilmore, and the defendants appearing in person and by their attorney, G. J. Lomen, Esq., and witnesses on behalf of the plaintiff, and defendants having been sworn and testified, and documentary evidence and depositions on behalf of the parties hereto being read and introduced in evidence, and the Court having heard the arguments of counsel for the respective parties, and having taken the same under advisement, and having thereafter, on the 21st day of October, 1913, filed its written opinion herein, finding for the plaintiff and against the defendants, and having heretofore on the 28th day of October,

1913, made and filed its findings of fact and conclusions of law herein, and being now fully advised in the premises, and upon motion of attorneys for plaintiff, it is hereby,

ORDERED, ADJUDGED AND DECREED, that the plaintiff do have judgment as prayed for in his complaint herein, against the defendants and each of them; that the mining copartnership between plaintiff and defendants named the Klery Creek Mining Company be, and the same is hereby dissolved; that the plaintiff be, and he is hereby granted an accounting between the plaintiff and defendants of all and every matter [67] and thing arising under and by virtue of the mining copartnership known as the Klery Creek Mining Company, in accordance with the findings of the Court, heretofore made, filed and entered; and it is further ORDERED, ADJUDGED AND DECREED, that all the assets of the said Klery Creek Mining Company consist of mining claims and personal property situated thereon, and therewith connected, herein-after named; that under and by virtue of said accounting that said Klery Creek Mining Company is indebted to the Robinson-Magids & Company, or to Philip Murphy, its assignee, in the sum of \$16,484.82, with legal interest from September 1st, 1911, to date, amounting to \$2,830.12, amounting in principal and interest in all, to the sum of \$19,314.94; and that of said indebtedness the defendant Jack Lesamis owes to the Klery Creek Mining Company the sum of \$4,429.21; that the said defendant John Tyapay is indebted to the said Klery Creek Mining



Company in the sum of \$4,703.21; and the said defendant Andy Garbin is indebted to the said Klery Creek Mining Company in the sum of \$4,215.40, and the plaintiff H. Greenberg is indebted to the said Klery Creek Mining Company in the sum of \$5,967.10; it is further ORDERED, ADJUDGED AND DECREED that the plaintiff, H. Greenberg, is entitled to have the assets of said copartnership sold and the proceeds applied to the payment of said indebtedness, said assets of said copartnership being the mining claims described in plaintiff's complaint, and in the findings of fact heretofore made and filed by the Court, together with the personal property thereon situated, said mining claims all situated and located in the Noatuk-Kobuk Mining Precinct, District of Alaska, to wit:

Discovery Claim, One Above Discovery, Two Above Discovery, Six Below Discovery, Fraction between Two and Three Above Discovery, Association Fraction between Discovery and Starr, California Association, L. L. Klery Creek, opposite Discovery, Butte Association, R. L. Klery Creek opposite Discovery, Oregon Association (Bench and Creek), adjoining upper and Starr, and lower end of 1 and 2 Above Discovery, Bench [68] Seven, opposite Creek Claim Seven Below Gold Hill Association R. L. opposite 1, 2, 3 and 4 Creek claims. All the foregoing claims being situate on Klery Creek, or its benches; also Honey Claims, One and Two, between Klery and Bear Creeks, North Pole Association L. L. adjoining claims last-above described, One and Two Above Discovery on Bear Creek, Goldfield As-



sociation opposite 1 and 2 Above and one Below L. L. Bear Creek, Rich Association on Bear Creek, and adjoining 2 Above Central Association, adjoining No. 1 Below on Central Creek, Discovery on Central Creek, One Above on Central Creek, One Below on Central Creek, Fraction (Garbin) on Central Creek, Discovery Claim on Jack Creek, a tributary of Klery; all interest of said first party in all mining claims owned in whole or in part in Rocky Creek in said mining and recording district.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the defendants, George Stanley and Sam Sallo are the trustees for the defendants, Andy Garbin and Jack Lesamis, respectively, and that said defendants, Stanley and Sallo, by the conveyances made to them, took and now hold the legal title to the property described in said conveyances in trust for said defendants, Andy Garbin and Jack Lesamis, and subject to the said indebtedness of the said Klery Creek Mining Company.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the United States Marshal for the District of Alaska, Second Division, sell the whole of said assets, both personal and real above described, under order and execution of the Court in this action in the manner provided by law, and pay the proceeds of said sale to the clerk of the above-entitled court and that said clerk pay and distribute the said proceeds so received by him in the following manner:

1. The plaintiff's costs and expenses in this litigation.

2. The said indebtedness of the Klery Creek Mining Company to Robinson-Magids & Company or Philip Murphy, as assignee. [69]

3. The balance of said proceeds, if any, to the defendants or their assigns, to the amount of \$18,-761.81.

4. The balance of said proceeds, if any, still remaining, to be distributed equally between the plaintiff and the defendants, Andy Garbin, Jack Lesamis, John Tyapay, or their assigns.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff do have judgment and execution against the defendants and each of them, for his costs and disbursements in this action, taxed at the sum of \$141.95. dollars.

Done in open court this 28 day of October, 1913.

CORNELIUS D. MURANE,  
District Judge.

Service of foregoing decree admitted by receipt of copy this 24th day of Oct., 1913.

G. J. LOMEN,  
Of Attys. for Defs.

[Endorsed]: No. 2349. In the District Court for the District of Alaska, Second Division. H. Greenberg, Plaintiff, vs. Jack Lesamis, Defendant. Decree. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 28, 1913. John Sundback, Clerk. By J. A. B., Deputy. J. F. Hobbes and William A. Gilmore,

Attorneys at Law, Nome, Alaska, Attorneys for Plaintiff. J. D. 2, p. 218. Vol. 10, Orders and Judgments, p. 368. C. [70]

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**Mandate.**

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to  
the Honorable the Judges of the Dis-  
[Seal] trict Court of the United States for the  
District of Alaska, Second Division,  
GREETING:

WHEREAS, lately in the District Court of the United States for the District of Alaska, Second Division, before you, or some of you, in a cause between H. Greenberg, Plaintiff, and Jack Lesamis, John Tyapay, Andy Garbin, George Stanley and Sam Sallo, Defendants, No. 2349, a Decree was duly filed on the 28th day of October, A. D. 1913, in favor of the plaintiff and against the defendant; which said Decree is of record in the said cause in the office of the clerk of the said District Court (to which record reference is hereby made and the same is hereby expressly made a part hereof), as by the inspection of the Transcript of the Record of the said District Court, which was brought into the United States Circuit Court of Appeals for the Ninth Circuit by virtue of an appeal agreeably to the Act of Congress in such case made and provided, fully and at large appears;

AND WHEREAS, on the second day of March in the year of our Lord one thousand nine hundred and

fifteen, the said cause came on to be heard before the said Circuit Court of Appeals, on the said Transcript of the Record and was duly submitted:

ON CONSIDERATION WHEREOF, it is now here ordered, adjudged and decreed by this Court that Finding No. II of the said District Court be changed to conform to the opinion of this Court, and that the Decree of the said District Court be modified accordingly, and that as so modified the said Decree be, and hereby is affirmed, neither party to recover costs on the appeal. (August 9, 1915.)

YOU, THEREFORE, ARE HEREBY COMMANDED

That such execution and further proceedings be had in the said cause in accordance with the opinion and decree of this Court and as according to right and justice and the laws of the United States ought to be had, the said decree of the said District Court notwithstanding. [71]

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, the tenth day of September, in the year of our Lord one thousand nine hundred and fifteen, and of the Independence of the United States of America the one hundred and fortieth.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.

[Endorsed]: #2349. No. 2514. United States  
Circuit Court of Appeals for the Ninth Circuit.



Jack Lesamis et al. vs. H. Greenberg. Mandate. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Feb. 5, 1916. G. A. Adams, Clerk. By W. C. McG., Deputy. Vol. 11, page 210, Orders and Judgments. C. [72]

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*In the District Court for the Territory of Alaska,  
Second Division.*

No. 2349.

H. GREENBERG,

Plaintiff,

vs.

JACK LESAMIS, JOHN TYAPAY, ANDY  
GARBIN, GEORGE STANLEY and SAM  
SALLO,

Defendants.

**Notice of Hearing Motion and Petition for Amended  
Findings, etc.**

To Wm. A. Gilmore and J. F. Hobbes, Attorneys for  
Plaintiff.

TAKE NOTICE that on Saturday, the 27th day of May, 1916, at 11 o'clock A. M., or as soon thereafter as counsel can be heard, at the courthouse in the city of Nome, Territory of Alaska, the defendants will bring on for hearing the motion and petition hereto annexed.

That said motion is based upon the petition, the opinion and mandate of the Circuit Court of Ap-



peals, and upon the records and files of said court in said action.

O. D. COCHRAN,  
G. J. LOMEN,  
Attorneys for Defendants. [73]

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*In the District Court for the Territory of Alaska,  
Second Division.*

No. 2349.

H. GREENBERG,

Plaintiff,

vs.

JACK LESAMIS, JOHN TYAPAY, ANDY  
GARBIN, GEORGE STANLEY and SAM  
SALLO,

Defendants.

**Motion for Amended Findings, etc.**

Now come the defendants above-named and upon the petition hereto annexed, the opinion and mandate of the Circuit Court of Appeals and the records and files herein, move the court for amended findings in accordance with the opinion and mandate of said Circuit Court of Appeals, and that the judgment herein be amended accordingly and as prayed for in said petition, and for an order of said court vacating and setting aside the sale on execution of the premises described in the judgment and that the order confirming said sale be vacated and set aside.

O. D. COCHRAN,  
G. J. LOMEN,  
Attorneys for Defendants. [74]

*In the District Court for the District of Alaska,  
Second Division.*

No. 2349.

H. GREENBERG,

Plaintiff,

vs.

JACK LESAMIS, JOHN TYAPAY, ANDY  
GARBIN, GEORGE STANLEY and SAM  
SALLO,

Defendants.

**Petition for Amended Findings, etc.**

Now come the defendants above-named and petition and show to the Court:

I.

That such proceedings were had in the above-entitled action that a decree was, on the 28th day of October, 1913, entered by said Court dissolving the partnership known as the Klery Creek Mining Company theretofore existing between said plaintiff H. Greenberg and the defendants Jack Lesamis, John Tyapay and Andy Garbin, and a partial accounting of said partnership matters was by said decree made as will more fully appear by reference to the findings and judgment on file and of record in said court, reference to which is hereby made.

II.

That such proceedings were thereafter had that on the 10th day of August, 1914, the property of said partnership consisting of the mining claims men-

tioned in the complaint and certain personal property was sold by the United States Marshal under a pretended writ of execution issued in said action; that said mining claims were at said sale bid in by said plaintiff H. Greenberg for the sum of Three Thousand (\$3,000) Dollars, but that said money so bid was never [75] paid except the sum of \$107.07 thereof, being the costs of sale, and that no part of said money so bid was ever delivered by said marshal to the clerk of said court as ordered and directed by the judgment of said court above referred to. That said plaintiff is still the holder of the marshal's certificate of sale of said premises and that no marshal's deed has yet been made or delivered of said premises, as your petitioners are informed and believe.

### III.

That the defendants above-named duly objected to the confirmation of said sale and thereafter took an appeal from said decree and from the order confirming said sale, and such proceedings were thereafter had on said appeal in the Circuit Court of Appeals in and for the Ninth Circuit.

### IV.

That the findings and judgment or decree of said District Court were, by the opinion of said Circuit Court of Appeals made and entered August 9th, 1915, in part reversed and modified as more fully appears in and by said opinion reported in 225 Federal Reporter, page 449, reference to which opinion is hereby made.

## V.

That thereafter on the 10th day of September, 1915, the mandate of said Circuit Court of Appeals was duly issued and on the 5th day of February, 1916, was duly filed in the office of the clerk of said District Court. A copy of said mandate is hereto attached, marked Exhibit "B."

## VI.

That in and by said opinion and mandate the said District Court was ordered and directed to change and modify its findings and judgment herein to conform to said opinion and mandate, and that such execution and further proceedings be had in said cause in accordance with said opinion and mandate and as according to right and justice and the laws of the United States ought to be had. [76]

## VII.

That in the execution and further proceedings to be had in said cause, accordingly, it is necessary, and according to right and justice, that the several findings of said court should be made consistent with each other and with finding No. 11 directed to be and when amended; that palpable mistakes in the matter of computation by either court should be corrected; that said judgment appealed from, so amended and corrected, should be made final upon all material issues presented, according to the facts found, and according to such new facts as the Court, upon a hearing of this petition, shall find have arisen since the entry of said judgment appealed from, and which facts are material in the execution and further proceedings in said cause directed to be had.



That mistakes of omission and commission in the matter of said accounting and computation were made by the trial court and by said Circuit Court of Appeals, to the grievous injury of these defendants unless the same be now corrected and which mistakes appear by a mere inspection of the findings, judgment and opinion themselves, when taken by their four corners, and which these defendants, on the hearing of this petition, will be able to point out, and which appear in the statement of account hereto attached and made a part hereof, marked Exhibit "A."

#### VIII.

That the accounting made by said District Court was incomplete, in that it did not show the status of the account of each partner with reference to said partnership nor the status of the account of each partner with reference to his copartners, but only with reference to the indebtedness of said parties to the creditor, Robinson-Magids & Company; and that said judgment was in part final and in part interlocutory.

That your petitioners present herewith a statement of account (said Exhibit "A"), showing, first, how the account of the Klery Creek Mining Co. stands with reference to strangers. Secondly, how the account of each partner [77] stands with reference to said firm. And, third, how the account of each partner stands with reference to his copartners, said statement of account being based upon and wholly deduced from the findings of fact of the said District Court as modified on appeal herein.



WHEREFORE your petitioners pray that the findings of fact and judgment herein may be amended and modified as directed in said mandate, and as explained and indicated by said statement of account, and that the order confirming the sale on execution above referred to be vacated and said sale set aside, that a final decree be entered, and for such other and further relief as to the Court shall seem just and proper in the premises.

O. D. COCHRAN,

G. J. LOMEN,

Attorneys for Defendants.

United States of America,  
Territory of Alaska,—ss.

G. J. Lomen, being duly sworn, on oath deposes and says: That he is one of the attorneys for the defendants herein; that he has read the foregoing petition, knows the contents thereof and the same is true as he verily believes; that he makes this verification on behalf of said defendants because said defendants, and each of them, are more than one hundred miles from Nome, the place of trial.

G. J. LOMEN.

Subscribed and sworn to before me this 16th day of May, 1916.

[Seal]

D. B. CHASE,

Notary Public for the Territory of Alaska, Residing at Nome.

(My commission expires May 12th, 1917.) [78]

**Exhibit "A"—Statement of Account.****JOURNAL.****KLERY CREEK MINING CO.**

1910. (Ledger)

(Folio )

1	H. Greenberg.....	\$16,351.42	
1	To cleanup, 1910.....		\$16,351.42
2	Expense .....	8,959.75	
2	To Robinson-Magids Co.....		8,959.75

This represents the total expense of operations in 1910 of the Klery Creek Mining Co.; for adjustment of accounts Robinson-Magids & Co., are used as representing all creditors.

2	Robinson-Magids & Co., & creditors..	8,959.75	
1	To H. Greenberg .....		8,959.75

This was to pay the above item of expense of the Klery Creek Mining Co., and show that Greenberg paid it out of the 1910 cleanup of \$16,351.42.

3	Jack Lesamis.....	1,726.00	
3	John Tyapay .....	2,000.00	
4	Andy Garbin .....	1,512.19	
1	To H. Greenberg.....		5,238.19

This represents what was a part of the net proceeds but Greenberg, having all the money belonging to the company, paid out the above to defendants and took credit on his \$24,000 account. This was the three defendants own money and is made to appear on the books of the company for the purpose only of showing how Greenberg disposed of the \$16,351.42 and in the following item we again

charge this back to Greenberg as he owes it to the Klery Creek Mining Company. [79]

1910. (Ledger)

(Folio )

1	H. Greenberg .....	\$ 5,238.19	
3	To Jack Lesamis .....		\$ 1,726.00
3	To John Tyapay.....		2,000.00
4	To Andy Garbin .....		1,512.19

This represents the amount Greenberg took of the net proceeds to pay on his \$24,000 personal account which offsets the credit Greenberg received on these books and makes him owing the Klery Creek Mining Company this amount.

2	Robinson-Magids & Co.....	2,153.48	
1	To H. Greenberg.....		2,153.48

This represents the balance of the net proceeds and should have been paid to Jack Lesamis, John Tyapay and Andy Garbin, as it was their own money that Greenberg held, but Greenberg paid the same to Robinson-Magids & Co., to be credited on their books to the defendants as follows:

Jack Lesamis.....	\$737.89
John Tyapay .....	463.89
Andy Garbin .....	951.70

making the above total.

1	H. Greenberg .....	4,087.85	
3	To Jack Lesamis.....		1,362.62
3	To John Tyapay.....		1,362.62
4	To Andy Garbin.....		1,362.61

This represents what was due Greenberg of the 1910 cleanup of \$16,351.42 to pay on his \$24,000 personal debt being one quarter gross and due defendants. [80]

1910. (Ledger)

(Folio )

1	H. Greenberg .....	\$2,293.93	
3	To Jack Lesamis .....		746.64
3	To John Tyapay .....		746.64
4	To Andy Garbin .....		746.65

This represents Greenberg's one-fourth gross of the 1910 expenses as advanced by the defendants in the payment made to Robinson-Magids & Co. (creditors) of \$8,959.75.

1911. 1911.

2	Expenses .....	\$28,425.18	
2	To Robinson-Magids & Co. ....		\$28,425.18

This represents the true amount of the total expense of operation in 1911 of the Klery Creek Mining Co. The Court, in finding the total expense evidently overlooked the fact that the credit of \$2,153.48, the amount paid by Greenberg to the Robinson-Magids Co., for the personal credit of the defendants, had been deducted from this amount by Robinson-Magids Co. by crediting Klery Creek Mining Co. with it, leaving \$26,271.70 the amount of total expense for 1911 as found by the Court.

1	H. Greenberg .....	9,786.88	
1	To Cleanup .....		9,786.88
2	Robinson-Magids & Co. ....	9,786.88	
1	To H. Greenberg .....		9,786.88

This represents the 1911 cleanup  
paid by Greenberg to apply on account.

[81]

1910. (Ledger)

(Folio )

1	Cleanups .....	\$2,153.48	
3	To Jack Lesamis .....		737.89
3	John Tyapay .....		463.89
4	Andy Garbin .....		951.70

This represents the 1910 credits  
of defendants which Greenberg de-  
posited with Robinson-Magids & Co.  
for their personal accounts but Robin-  
son-Magids Co. credited the \$2,153.48  
to the Klery Creek Mining Co. ac-  
count and not to the defendants, there-  
fore this being their personal money  
they are entitled to credit on the  
books of the Klery Creek Mining Co.  
for the total amount.

1	H. Greenberg .....	2,446.72	
3	To Jack Lesamis .....		815.57
3	John Tyapay .....		815.57
4	Andy Garbin .....		815.58

This represents what was due Green-  
berg out of the 1911 cleanup of  
\$9786.88 to pay on his \$24,000 per-  
sonal account being one-quarter of the  
gross and due defendants.

1	H. Greenberg .....	6,567.93	
3	Jack Lesamis .....	6,567.93	
3	John Tyapay .....	6,567.92	
4	Andy Garbin .....	6,567.92	
2	To expenses .....		26,271.70



This represents a division of the balance of total expense (as explained) of the Klery Creek Mining Co. at the close of the season in 1911 amongst the partners so as to ascertain the amount due by each partner to the Klery Creek Mining Co. [82]

1910. (Ledger)

(Folio )

1	Cleanups .....	\$7,340.16	
3	To Jack Lesamis .....		\$2,446.72
3	John Tyapay .....		2,446.72
4	Andy Garbin .....		2,446.72

This represents a division of the balance of the 1911 cleanup (after Greenberg's one-quarter gross is applied on his \$24,000 personal debt due defendants and is charged against him in the item of \$2446.72 divided into equal credits for each partner of \$815.57) so as to ascertain the amount due by each partner to the Klery Creek Mining Co.

1	Cleanups .....	11,113.23	
2	To expense .....		11,113.23
1913.	1913.		
1	H. Greenberg .....	3,539.75	
3	Jack Lesamis .....	75.79	
3	John Tyapay .....	121.10	
4	Andy Garbin .....	40.44	
2	To interest .....		3,777.08

This represents the amount of interest each partner owes the Klery Creek Mining Co. from Sept. 1, 1911, to October 24, 1913. Date of the findings.

2	Interest .....	2,830.12	
2	To Robinson-Magids Co.....		2,830.12

This represents the amount of interest due Robinson-Magids Co. from Sept. 1, 1911, to Oct. 24, 1913, making the total amount of indebtedness on the books of the Klery Creek Mining Co., the same as the judgment of the Court, \$19,314.94. [83]

LEDGER.

KLERY CREEK MINING CO.

CLEANUPS.

(Cr. represents gold-dust taken out.)

(Debit represents adjustments and this account used in place of Profit and Loss.)

1910.		1910.	
Re-settlement (J.4)	\$2,153.48	Gold-dust 1910 (J.1)	16,351.42
1911.		1911.	
Re-settlement (J.5)	7,340.16	Gold-dust 1911 (J.3)	9,786.88
" expense (J.5)	11,113.23		
Balance	5,531.43		
	<hr/>		<hr/>
	\$26,138.30		\$26,138.30

1911.

Sept. 1. Balance ...\$5,531.43

H. GREENBERG.

1910.		1910.	
Cleanup 1910 (J.1)	16,351.42	Robinson-Magids &	
Jack Lesamis, J. Ty-		Co. (J.1)	8,959.75
pay & A. Gar-		Jack Lesamis (J.1)	
bin (J.2)	5,238.19		1726.00
(do) (J.2)	4,087.85	John Tyapay (J.1)	
(do) (J.3)	2,239.93		2000.00

		Andy Garbin (J.1)	
		1512.19	5,238.19
		Robinson-Magids &	
		Co. (J.2)	2,153.48
		Balance due Kler.	
		Cr. M. Co. end of	
		1910 season	11,565.97
		<hr/>	<hr/>
		\$27,917.39	\$27,917.39
1911. Balance May 1,			
1911		11,565.97	
To Cleanups (J.3)	9,786.88	Robinson-Magids &	
J. Lesamis, J. Tya-		Co. (J.3)	9,786.88
pay & Garbin (J.4)	2,446.72	Balance due Klery	
$\frac{1}{4}$ Bal. of debts		Creek M. Co. end	
1911, (J.4)	6,567.93	of 1911 season,	20,580.62
	<hr/>		<hr/>
	\$30,367.50		\$30,367.50

1911.

Sept. 1, Balance Due 20,580.62

1913.

Oct. 24. Interest to

date (J.5) 3,539.75

Amount due Klery Creek Mining Co., October 24, 1913,  
\$24,120.37 [84]

## EXPENSE.

(Debits represent total indebtedness.)

(Credits represent adjustments and charges.)

1910.

Robinson-Magids &		Re-Settlement (Ex-	
Co. (J.1)	\$8,959.75	pense 1911) (J.4)	26,271.70

1911.

Robinson-Magids &		(Exp. 1910, +2153.48,	
Co. (J.3)	28,425.18	(credit, (J.5)	11,113.23
	<hr/>		<hr/>
	\$37,384.93		\$37,384.93

ROBINSON-MAGIDS CO.

1910.		1910.	
To H. Greenberg			
(J.1)	8,959.75	By expense	(J.1) 8,959.75
To H. Greenberg		1911.	
(J.2)	2,153.48	By Expense	(J.3) 28,425.18
To H. Greenberg			
(J.3)	9,786.88		
Balance Due ...	16,484.82		
	<hr/>		<hr/>
	\$37,384.93		\$37,384.93

1911.

Sept. 1. Balance Due 16,484.82

1913.

Oct. 24. Interest to  
date, (J.5) 2,830.12

Amount due Robin-  
son-Magids Co.,

Oct. 24, 1913 \$19,314.94

INTEREST.

1913.

Oct. 24. (J.5) 2,830.12 Oct. 24. (J.5) 3,777.08  
[85]

JACK LESAMIS.

1910.		1910.	
To cash Greenberg		By H. Greenberg (J.2)	1,726.00
(J.1)	1,726.00	By “ (J.2)	1,362.62
Balance	2,109.26	By “ (J.3)	746.64
	<hr/>		<hr/>
	3,835.26		3,835.26

1911.

¼ Bal. of debt, 1911  
(J.4) 6,567.93

1911.

Balance due 2,109.26

“ from 1910 net  
proceeds (J.4) 737.89

By H. Greenberg  
(J.4) 815.57

By 1911 cleanup (J.5) 2,446.72

Balance ..... 458.49

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6,567.93

---

6,557.93

1911.

Sept. 1. Balance Due 458.49

1913.

Oct. 24. Interest to date  
(J.5) 75.79

Amount due Klery

Creek Mining Co.

Oct. 24, '13..... 534.28

## JOHN TYAPAY.

1910.

To Cash H. Greenberg  
(J.1) 2,000.00

1910.

By H. Greenberg  
(J.2) 2,000.00

By H. Greenberg  
(J.2) 1,362.62

Balance ..... 2,109.26 By H. Greenberg  
(J.3) 746.26

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\$3,109.26

---

\$3,109.26

1911.

¼ Bal. of debts, 1911,  
(J.4) 6,567.92

Balance due 2,109.26

“ from 1910 net  
proceeds (J.4) 463.89

By H. Greenberg  
(J.4) 815.57

By 1911 cleanup (J.5) 2,446.72

Balance 732.48

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\$6,567.92

---

\$6,567.92



1911.

Sept. 1. Balance Due      732.48

1913.

Oct. 24. Interest to date

(J.5) 121.10

Amount due Klery

Creek Mining Co.

October 24, 1913. . \$853.58

[86]

ANDY GARBIN.

To cash H. Greenberg

(J.1) 1,512.19

By H. Greenberg

(J.2) 1,512.19

By H. Greenberg

(J.2) 1,362.61

By H. Greenberg

Balance ..... 2,109.26

(J.3) 746.65

---

\$3,621.45

---

\$3,621.45

1911.  $\frac{1}{4}$  Bal. of debts,

1911 (J.4) 6,567.92

Balance Due

2,109.26

“ from 1910 net

profits (J.4) 951.70

By H. Greenberg

(J.4) 815.58

By cleanup 1911

(J.5) 2,446.72

Balance ..... 244.66

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\$6,567.92

---

\$6,567.92

1911.

Sept. 1. Balance due      244.66

1913.

Oct. 24. Interest to date

(J.5) 40.44

Amount Due Klery

Creek Mining Co.

Oct. 24, 1913.... \$285.10

## MEMORANDUM LEDGER.

H. GREENBERG.

1910. Balance on $\frac{1}{4}$	1910.
interest \$24,000.00	By cash,
	Lesamis....1726.00
	Tyapay ....2000.00
	Garbin .....1512.19    5,238.19
	<hr/>
	1911.
	By amts. bal. $\frac{1}{4}$ gross
	not paid:
	Lesamis .... 452.19
	Tyapay .... 178.19
	Garbin ..... 666.00
	(now due).....1,296.38

The amount \$1296.38 is arrived at by deducting the amount overpaid in 1910 which is the difference between \$5238.19 and \$4087.85 or \$1150.34 to be deducted from  $\frac{1}{4}$  gross of 1911 \$2446.72 leaves \$1296.38.

Balance contingently due defendants, \$17,465.43.

(\$2400.00 due Stanley & Sallo—see findings.)

On final adjustment the \$6478.39 (due the company from the partners in excess and over and above the debts of the Klery Creek Mining Co.) should be divided equally, but Greenberg's one-quarter would apply on his \$24,000 debt, therefore the defendants are entitled to all of the surplus and as it is far in excess of what they owe the company, Greenberg should pay the Robinson-Magids Co. "Subrogation and Contribution." [87]

## SUMMARY OF LEDGER ACCOUNTS FOR 1910.

Cleanups .....	\$16,351.42
H. Greenberg .....	\$11,565.97
Expense .....	8,959.75
Robinson-Magids Co.....	2,153.48
Jack Lesamis .....	2,109.26
John Tyapay .....	2,109.26
Andy Garbin .....	2,109.26
	<hr/>
	\$22,679.20      \$22,679.20

SUMMARY OF LEDGER ACCOUNTS FOR 1911.

Cleanups (fiction) .....	5,531.43	
H. Greenberg .....	\$20,580.62	
Robinson-Magids & Co.....		16,484.82
Jack Lesamis .....	458.49	
John Tyapay .....	732.48	
Andy Garbin .....	244.66	
	<hr/>	<hr/>
	\$22,016.25	\$22,016.25

SUMMARY OF LEDGER ACCOUNTS, OCT. 24, 1913.

Cleanups (profit and loss a/c.) .....	5,531.43	
H. Greenberg .....	24,120.37	
Robinson-Magids & Co.....		19,314.94
Interest (Difference in Int. a/cs.)..		946.96
Jack Lesamis .....	534.28	
John Tyapay .....	853.58	
Andy Garbin .....	285.10	
	<hr/>	<hr/>
	\$25,793.33	\$25,793.33

[88]

**Exhibit "B"—Mandate.**

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to  
the Honorable the Judges of the  
(Court Seal) District Court of the United States  
for the District of Alaska, Second  
Division, GREETING:

WHEREAS, lately in the District Court of the  
United States for the District of Alaska, Second  
Division, before you, or some of you, in a cause be-  
tween H. Greenberg, plaintiff, and Jack Lesamis,  
John Tyapay, Andy Garbin, George Stanley and  
Sam Sallo, defendants, No. 2349, a decree was duly

filed on the 28th day of October, A. D. 1913, in favor of the plaintiff and against the defendant; which said decree is of record in the said cause in the office of the clerk of the said District Court (to which record reference is hereby made and the same is hereby expressly made a part hereof), as by the inspection of the Transcript of the Record of the said District Court, which was brought into the United States Circuit Court of Appeals for the Ninth Circuit by virtue of an appeal agreeably to the Act of Congress in such cases made and provided, fully and at large appears:

AND WHEREAS, on the second day of March, in the year of our Lord one thousand nine hundred and fifteen, the said cause came on to be heard before the said Circuit Court of Appeals, on the said Transcript of the Record and was duly submitted;

ON CONSIDERATION WHEREOF, it is now here ordered, adjudged and decreed by this Court, that Finding No. 11 of the said District Court be changed to conform to the opinion of this Court, and that the Decree of the said District Court be modified accordingly, and that as so modified the said decree be, and hereby is, affirmed, neither party to recover costs on the appeal.

(August 9, 1915.)

YOU, THEREFORE, ARE HEREBY COMMANDED, That such execution and further proceedings be had in the said cause in accordance with the [89] Opinion and Decree of this Court and as according to right and justice and the laws of the

United States ought to be had, the said decree of the said District Court notwithstanding.

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, the tenth day of September, in the year of our Lord one thousand nine hundred and fifteen, and of the independence of the United States of America the one hundred and fortieth.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk. [90]

Service of the within and foregoing petition hereby accepted this —— day of ——, 1916.

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Service of the within notice, motion and petition is hereby admitted at Nome, Alaska, this 20th day of May, 1916.

J. F. HOBBS,  
Of Attys. for Plff.

[Endorsed]: #2349. In the District Court for the District of Alaska, Second Division. H. Greenberg, Plaintiff, vs. Jack Lesamis, John Tyapay, Andy Garbin, George Stanley and Sam Sallo, Defendants. Notice, Motion and Petition. Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. May 20, 1916. G. A. Adams, Clerk. By ———, Deputy. L. O. D. Cochran, G. J. Lomen, Attorneys for defendants. [91]



*In the District Court for the District of Alaska,  
Second Division.*

TERM MINUTES, General 1916 Term, Beginning  
January 29, 1916.

Saturday, May 27, 1916, at 11 A. M.

Court convened pursuant to adjournment,—Honorable J. R. TUCKER, District Judge, presiding.

Upon the convening of court the following proceedings were had:

**Minute Order of May 27, 1916.**

2349.

H. GREENBERG,

vs.

JACK LESAMIS et al.

Hearing on motion of defendants to amend findings, and amend judgment accordingly, had.

G. J. Lomen, counsel for defendants, submitted oral argument.

At 12 o'clock court adjourned until 2 P. M.

2 P. M.

Argument of counsel Lomen continued.

J. F. Hobbes, counsel for plaintiff, entered appearance of plaintiff and made objection to the jurisdiction of the Court to modify the decree in this case in any way except as directed by the mandate.

Amended findings of fact and conclusions of law, together with amended decree, were submitted to the Court for consideration.

Memorandum brief on mandate also submitted.

Closing argument by counsel Lomen.

Matter submitted, counsel to furnish briefs.

At 5 P. M. Court adjourned until 2 P. M. Monday,  
May 29th, 1916. [92]

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*In the District Court for the District of Alaska,  
Second Division.*

No. 2349.

H. GREENBERG,

Plaintiff,

vs.

JACK LESAMIS, JOHN TYAPAY, ANDY GARBIN,  
GEORGE STANLEY, and SAM SALO.  
Defendants.

**Amended Findings of Fact and Conclusions of Law.**

This cause being an equitable action, having come on regularly to be heard before the Court on the 15th day of September, 1913, and the trial thereof continuing thereafter from day to day to the 19th day of September, 1915, the plaintiff appearing in person and by his attorneys, Messrs. J. F. Hobbes and William A. Gilmore; and the defendants appearing in person and by their attorney, G. J. Lomen, Esq., and witnesses on behalf of the plaintiff and defendants having been sworn and testified, and documentary evidence and depositions on behalf of the parties hereto having been read and introduced in evidence, and the Court having heard the arguments of counsel for the respective parties and having thereafter and on the 21st day of October, 1913, ren-

dered and filed its written opinion herein, and being now fully advised in the premises, makes the following findings of fact and conclusions of law, to wit:

### FINDINGS OF FACT.

#### I.

The Court finds that heretofore and on the 19th day of March, 1910, and for a long time prior thereto, the defendants, Jack Lesamis, John Tyapay and Andy Garbin, were the owners and in the possession of certain placer mining claims situated in the Noatak-Kobuk Mining and Recording District, District of Alaska, and that the legal title to said placer mining claims stood in the names of said defendants by virtue of certain placer locations by them made in said mining district; that on the said 19th day of March, 1910, the said defendants, Jack Lesamis, John Tyapay and Andy Garbin, entered into certain written instruments whereby and wherein they agreed with the plaintiff to form a copartnership to work and mine said mining claims, and to give and convey to the plaintiff [93] an undivided one-quarter ( $\frac{1}{4}$ ) interest in all said placer mining claims, lode claims and water rights then owned, acquired or to be acquired by said defendants in consideration of the plaintiff furnishing them with provisions from time to time from the said 19th day of March, 1910, to July, 1910, and agreed to pay the defendants the sum of six thousand dollars (\$6,000.00) in cash and thereafter the further additional sum of twenty-four thousand (\$24,000.00) from one-fourth of the gross output of said mining operations to be thereafter conducted and had upon said mining claims; that the

said agreement between the parties, plaintiff and said defendants, was reduced to writing and incorporated in the following two written instruments, which said instruments were executed, witnessed and delivered between the parties, to wit:

“Agreement:

Klery Creek, March 19th, 1910.

Know all men by these presents That we the undersigned John Tyapay, Andy Garbin and Jack Lesamis of the Noatak-Kobuk Recording District, District of Alaska, and H. Greenberg of Nome, Ala., enter into this agreement, that for the sum of one dollar lawful money of the United States in hand paid and other valuable services, for same services H. Greenberg is, and shall be a full fledged partner with the above mentioned parties & have one quarter undivided interest in all claims, lodes, water rights acquired or to be acquired and owned by the above-mentioned parties. It is further agreed that H. Greenberg is to furnish the above-mentioned parties with Provisions from time to time up till July, 1910.

ANDY GARBIN. [Seal]

JACK LESAMIS. [Seal]

JOHN TYAPAY. [Seal]

H. GREENBERG. [Seal]

Witnesseth:

SAM MAGIDS,

HERMAN BERNHARDT.”

“This indenture made the 19th day of March in the year of our Lord One thousand nine hundred and ten between the undersigned Andy Garbin, Jack Lesamis and John Tyapay of the Noatak-Kobuk re-



ording District, of the District of Alaska, parties of the first part, and H. Greenberg of Nome, Alaska, party of the second part witness, That the said parties of the first part, for and in consideration of the sum of Thirty Thousand dollars (\$30,000.00).

Six thousand dollars (\$6,000.00) in lawful money of the United States of America to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, and the balance of twenty-four thousand to be paid of the first money taken out of the ground hath, granted, bargained, sold, remised, released, and forever quitclaimed and by these presents doth grant, bargain, sell, remise, release and forever quit-claim unto the said party of the second part, his heirs and assigns one-quarter ( $\frac{1}{4}$ ) undivided of all mining claims located, surveyed, *ecorded* and held by said parties of the first part situated in Noatak-Kobuk mining district, *district* of Alaska, together with all the dips, spurs and angles and also the metals, ores, gold and silver bearing quartz, rock and earth therein, and all the rights, privileges and franchises thereto incident, appendant and appurtenant or therewith usually had or enjoyed; and also all and singular the tenements, hereditaments and appurtenances, thereunto belonging, or in any wise appertaining, and the rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of in or to the said premises and every part or parcel thereof, with the appurtenances. [94]



To have and to hold, all and singular, *he* said premises, together with the appurtenances and privileges thereto incident, unto the said party of the second part his heirs and assigns forever warranting and defending the same against the claims of all persons, save and except the United States.

ANDY GARBIN. [Seal]

JACK LESAMIS. [Seal]

JOHN TYAPAY. [Seal]

Witnesseth:

SAM MAGIDS.

HERMAN BERNHARDT."

## II.

The Court finds that thereafter and at all times since said 19th day of March, 1910, plaintiff has fulfilled and carried out the terms, covenants and conditions on his part to be done, made, kept and performed and did furnish the defendants with the provisions mentioned in said written instrument and did pay to the defendants the sum of \$6,000.00 in lawful money of the United States, and the said defendants thereupon and in pursuance of the terms of said written instrument, entered into the mining copartnership known, named and called the Klery Creek Mining Company, and thereupon began mining operations upon said placer claims heretofore referred to and hereinafter named and set forth.

## III.

The Court finds that at the time said instruments were executed and delivered and at the time said mining copartnership was formed, the said defendants, Jack Lesamis, John Tyapay, and Andy Garbin,

ording District, of the District of Alaska, parties of the first part, and H. Greenberg of Nome, Alaska, party of the second part witness, That the said parties of the first part, for and in consideration of the sum of Thirty Thousand dollars (\$30,000.00).

Six thousand dollars (\$6,000.00) in lawful money of the United States of America to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, and the balance of twenty-four thousand to be paid of the first money taken out of the ground hath, granted, bargained, sold, remised, released, and forever quitclaimed and by these presents doth grant, bargain, sell, remise, release and forever quit-claim unto the said party of the second part, his heirs and assigns one-quarter ( $\frac{1}{4}$ ) undivided of all mining claims located, surveyed, *ecorded* and held by said parties of the first part situated in Noatak-Kobuk mining district, *district* of Alaska, together with all the dips, spurs and angles and also the metals, ores, gold and silver bearing quartz, rock and earth therein, and all the rights, privileges and franchises thereto incident, appendant and appurtenant or therewith usually had or enjoyed; and also all and singular the tenements, hereditaments and appurtenances, thereunto belonging, or in any wise appertaining, and the rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of in or to the said premises and every part or parcel thereof, with the appurtenances. [94]

To have and to hold, all and singular, *he* said premises, together with the appurtenances and privileges thereto incident, unto the said party of the second part his heirs and assigns forever warranting and defending the same against the claims of all persons, save and except the United States.

ANDY GARBIN. [Seal]

JACK LESAMIS. [Seal]

JOHN TYAPAY. [Seal]

Witnesseth:

SAM MAGIDS.

HERMAN BERNHARDT.”

## II.

The Court finds that thereafter and at all times since said 19th day of March, 1910, plaintiff has fulfilled and carried out the terms, covenants and conditions on his part to be done, made, kept and performed and did furnish the defendants with the provisions mentioned in said written instrument and did pay to the defendants the sum of \$6,000.00 in lawful money of the United States, and the said defendants thereupon and in pursuance of the terms of said written instrument, entered into the mining copartnership known, named and called the Klery Creek Mining Company, and thereupon began mining operations upon said placer claims heretofore referred to and hereinafter named and set forth.

## III.

The Court finds that at the time said instruments were executed and delivered and at the time said mining copartnership was formed, the said defendants, Jack Lesamis, John Tyapay, and Andy Garbin,

were the owners and in the possession of the following placer mining claims, to wit:

Discovery Claim; One Above Discovery, Two Above Discovery, Six Below Discovery, Fraction between Two and Three Above Discovery, Association Fraction between Discovery and Starr, California Association, L. L. Klery Creek, opposite Discovery, Butte Association, R. L. Klery Creek, opposite Discovery, Oregon Associated (Bench and Creek) adjoining upper end Starr, and lower end of 1 and 2 Above Discovery, Bench Seven, opposite Creek Claim Seven Below Gold Hill Association, R. L. opposite 1, 2, 3 and 4 Creek Claims, all the foregoing claims being situated on Klery Creek, or its Benches; also Honey Claims One and Two, between Klery and Bear Creeks, Northpole Association L. L. Adjoining claims, last above described, One and Two Above Discovery, on Bear Creek, Goldfield Association, opposite 1 and 2 Above and 1 Below L. L. Bear Creek, Rich Association on Bear Creek, and adjoining 2 Above Central Association, adjoining No. 1 Below on Central [95] Creek, Discovery on Central Creek, One Above on Central Creek, One Below on Central Creek, Fraction (Garbin) on Central Creek, Discovery claim on Jack Creek, a tributary of Klery. All interest of said first party in all mining claims owned in whole or part in Rocky Creek, in said mining and recording district.

And the Court further finds that all of said mining claims were put into said mining copartnership as assets by said defendants, and thereupon the said Klery Creek Mining Company entered into posses-



sion of said claims and began to mine and operate the same as a mining copartnership; that thereafter the said Klery Creek Mining Company operated said mining claims on said Klery Creek and vicinity, in the Noatak-Kobuk Recording District, between the said 19th day of March, 1910, and the first day of September, 1911; that during said term and time said mining claims were operated at a loss to said mining copartnership of \$16,484.82, and that said indebtedness is due with legal interest to date, to Robinson-Magids & Company, or its assignee, for goods, wares and merchandise and for money advanced and paid out at the request of said Klery Creek Mining Company.

#### IV.

The Court finds that on or about the first day of September, 1911, the said Klery Creek Mining Company executed several written leases upon several of the said mining claims above mentioned belonging to the said Klery Creek Mining Company, for the purpose of having said mining claims mined during the winter of 1911, under all of which leases certain stipulated royalties were reserved to be paid to said mining copartnership.

#### V.

The Court finds that theretofore and on or about the first day of September, 1911, the defendants Andy Garbin and Jack Lesamis, in violation of the terms and conditions of the said copartnership agreement, conveyed, without consideration, to defendants George L. Stanley and Sam Sallo all their right, title and interest in the said Klery Creek Min-



ing Company copartnership property, real and personal, and the Court finds that said conveyances were void as against the plaintiff and the creditors of said Klery Creek Mining Company, and that said defendants, Stanley and Salo are the trustees for defendants Garbin and Lesamis. [96]

#### VI.

The Court finds that the said written instruments executed and delivered as above set forth were thereafter recorded in the office of the Noatak-Kobuk Recording District, on the 29th day of March, 1910, and the said defendants George L. Stanley and Sam Salo took and received the said transfers of title from the said defendants Andy Garbin and Jack Lesamis, with full knowledge and notice of the said copartnership and with full knowledge and notice of the fact that the said Klery Creek Mining Company had outstanding indebtedness at said time of the sum of \$16,484.82, incurred in mining operations theretofore conducted.

#### VII.

The Court finds that all of said royalties due or collected from the placer claims above described and set forth belonged to the Klery Creek Mining Company.

#### VIII.

The Court finds that heretofore and on the 24th day of October, 1911, one Philip Murphy, claiming an assignment of the account of Robinson-Magids & Company, creditors of said Klery Creek Mining Company, began an action at law in the above-entitled court, for the collection of \$17,124.00 and

interest, against the said Klery Creek Mining Company, and caused to be issued a writ of attachment against the mining property of said Klery Creek Mining Company; that the indebtedness of the said Klery Creek Mining Company to the said Philip Murphy, assignee of said Robinson-Magids & Company, should be paid from the first proceeds of the assets and property of said Klery Creek Mining Company, after the expense of this litigation is settled, and before any balance sum due the said defendants is paid, from the proceeds or assets of said mining copartnership.

#### IX.

The Court finds that owing to the acts and actions of the defendants it is impossible for the plaintiff and said defendants to further act and conduct the mining copartnership in the management and workings of said mining copartnership property and mining claims; that said defendants Stanley, Sallo, Garbin, Lesamis and Tyapay, are all insolvent and have no other property of value other than their interest in said copartnership property, and that the assets of the said Klery Creek Mining [97] Company consists of said mining claims above described, and certain personal property incident thereto and upon said mining claims, and that the said Klery Creek Mining Company has no money or other property except the said placer claims and personal property therewith connected to pay its indebtedness.

#### X.

The Court finds that the total gold production of 1910 of said Klery Creek Mining Company was \$16,-

251.42 and that the total expense of the said Klery Creek Mining Company for 1910 was \$8,959.75, leaving a net profit of \$7,391.67, of which the said defendant Jack Lesamis received \$1,726.00; John Tyapay, \$2,000.00, and Andy Garbin, \$1,512.12, and the said Lesamis had a credit for 1911 of \$737.89, and the said John Tyapay had a credit of \$463.89, and the said Andy Garbin had a credit of \$951.70.

That the total expense for the year 1911 was \$26,271.70 and the total gold production for the year 1911 amounted to \$9,786.88, leaving an indebtedness due the Robinson-Magids & Company or its assignee, Philip Murphy, of \$16,484.82 on the first day of September, 1911, with legal interest to date, amounting to \$2,830.12; that the Court further finds that the defendants in the years 1911 and 1912, in order to prevent a forfeiture did the annual assessment work on certain claims mentioned in paragraph V of the supplemental answer and cross-complaint of defendants Stanley and Sallo, of the total value of \$2,400.00 and that said amount is chargeable as indebtedness against the said Klery Creek Mining Company, and the defendants are entitled to be credited with the same.

## XI.

The Court finds that the total indebtedness of said Klery Creek Mining Company, due to the said Robinson-Magids & Company, or its assignee, Philip Murphy, with legal interest to date, amounts to \$19,314.94, and that and each of the said partners would be indebted to the said Klery Creek Mining Company for the sum of \$4,828.73, less the credits

above mentioned, and that the said defendant Lesamis is indebted to said Klery Creek Mining Company in the sum of \$2,875.33; that the said defendant Tyapay is indebted to the Klery Creek Mining Company in the sum of \$3,149.33; that the said defendant Garbin is indebted to the said Klery Creek Mining Company in the sum of \$2,661.52; that the said plaintiff Greenberg [98] is indebted to the Klery Creek Mining Company in the sum of \$10,628.76.

## XII.

The Court finds that it was the intent and meaning of the parties in forming said Copartnership that the balance payment of \$24,000 was to be paid from one-fourth of the gross output from the mining operations of the copartnership property, to which the said grantee, H. Greenberg, would be entitled, and that the defendants, Jack Lesamis, Andy Garbin and John Tyapay, have received on the said sum of \$24,000 the total sum of \$5,238.19, leaving a balance due to said defendants or their assigns from the one-fourth gross output, the sum of \$18,761.81.

## XIII.

The Court finds that the allegations contained in the answers of *of* the defendants that said balance payment was due from *from* the first gold-dust extracted and taken from the undivided one-quarter (1-4) interest in said mining property, is supported by the evidence, and is true.

## XIV.

The Court further finds that all allegations in the answers of the defendants and in their supplemental answer and cross-complaint inconsistent with the



above and foregoing findings, are not supported by the evidence in the case and are untrue.

### CONCLUSIONS OF LAW.

And from the above and foregoing findings of fact, the Court now makes the following

### CONCLUSIONS OF LAW:

#### I.

That the plaintiff, Greenberg, is entitled to an accounting and the mining claims and personal property situated thereon, mentioned in the complaint, are liable for the debts of the copartnership; that the copartnership, should be dissolved and the assets of the copartnership sold, and from the proceeds the costs and expenses of this litigation should be paid, then the indebtedness of the copartnership, after which the balance of the purchase price agreed to be paid by the plaintiff Greenberg should be paid, and the balance, if any, of said proceeds should be equally divided between the plaintiff Greenberg and the defendants Lesamis, Tyapay and Garbin, or their assigns.

#### II. [99]

That the plaintiff Greenberg is entitled to a final decree of this Court dissolving the said copartnership and directing the sale of the assets thereof, and the application of the proceeds of said assets to the payment of the indebtedness of said copartnership, and the distribution of the same, as above provided.

Done in open court this 10th day of June, 1916.

J. R. TUCKER,  
District Judge.



Service of the foregoing amendment of findings of fact and conclusions of law admitted by receipt of copy this —— day of May, 1916.

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Of Attorneys for Defendants.

[Endorsed]: No. 2349. In the District Court for the District of Alaska, Second Division. H. Greenberg, Plaintiff, vs. Jack Lesamis et al., Defendants. Amended Findings of Facts and Conclusions of Law. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Jun. 10, 1916, G. A. Adams, Clerk. By W. C. McG., Deputy. Orders and Judgments, Vol. 11, page 248. J. F. Hobbes and W. A. Gilmore, Attorneys for Plaintiff. [100]

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*In the District Court for the District of Alaska,  
Second Division.*

No. 2349.

H. GREENBERG,

Plaintiff,

vs.

JACK LESAMIS, JOHN TYAPAY, ANDY  
GARBIN, GEORGE STANLEY, and SAM  
SALLO,

**Amended Decree.**

This cause came on regularly to be heard before the Court without a jury, on the 15th day of September, 1913, and the trial thereof continued from day to day until the 19th day of September, 1913, the

plaintiff appearing in person and by his attorneys, Messrs. J. F. Hobbes and William A. Gilmore, and the defendants appearing in person and by their attorney G. J. Lomen, Esq., and witnesses on behalf of the plaintiff and defendants having been sworn and testified, and documentary evidence and depositions on behalf of the parties hereto being read and introduced in evidence, and the Court having heard the arguments of counsel for the respective parties, and having taken the same under advisement, and having thereafter, on the 21st day of October, 1913, filed its written opinion herein, finding for the plaintiff and against the defendants, and having heretofore on the 28th day of October, 1913, made and filed its findings of fact and conclusions of law herein, and being now fully advised in the premises, and upon motion of attorneys for plaintiff, it is hereby.

ORDERED, ADJUDGED AND DECREED, that the plaintiff do have judgment as prayed for in his complaint herein, against the defendants and each of them; that the mining copartnership between plaintiff and defendants named the Klery Creek Mining Company consist of mining claims and persolved; that the plaintiff be, and he is hereby granted an accounting between the plaintiff and defendants of all and every matter and thing arising under and by virtue of the mining copartnership known as the Klery Creek Mining Company, in accordance with the findings of the Court, heretofore made, filed and entered; and it is further Ordered, Adjudged and Decreed, that all the assets of the said Klery Creek Mining Company, be, and the same is hereby dis-

sonal property situated thereon, and therewith connected, hereinafter named; that under and by [101] virtue of said accounting that said Klery Creek Mining Company is indebted to the Robinson-Magids & Company, or to Philip Murphy, its assignee in the sum of \$16,484.82, with legal interest from September 1st, 1911, to date, amounting to \$2,830.12, amounting in principal and interest in all, to the sum of \$19,314.94, and that of said indebtedness the defendant Jack Lesamis owes to the Klery Creek Mining Company the sum of \$2,875.33; that the said defendant John Tyapay is indebted to the said Klery Creek Mining Company in the sum of \$3,149.33; that the said defendant, Andy Garbin, is indebted to the said Klery Creek Mining Company in the sum of \$2,661.52; that the plaintiff H. Greenberg, is indebted to the said Klery Creek Mining Company in the sum of \$10,628.76; it is further ORDERED, ADJUDGED AND DECREED that the plaintiff, H. Greenberg, is entitled to have the assets of said copartnership sold and the proceeds applied to the payment of said indebtedness, said assets of said copartnership being the mining claims described in plaintiff's complaint, and in the findings of fact heretofore made and filed by the Court, together with the personal property thereon situated, said mining claims all situated and located in the Noatak-Kobuk Mining Precinct, District of Alaska, to wit:

Discovery Claim, One Above Discovery, Two Above Discovery, Six Below Discovery, Fraction between Two and Three Above Discovery, Association Fraction between Discovery and Starr, Cali-

fornia Association, L. L. Klery Creek, opposite Discovery, Butte Association, R. L. Klery Creek, opposite Discovery, Oregon Association (Bench and Creek) adjoining upper end Starr, and lower end of 1 and 2 Above Discovery, Bench Seven, opposite Creek Claim Seven Below, Gold Hill, Association, R. L., opposite 1, 2, 3 and 4 creek claims, all the foregoing claims being situate on Klery Creek, or its benches; also Honey Claims, one and two, between Klery and Bear Creeks, Northpole Association L. L., adjoining claims last above described, One and Two Above Discovery on Bear Creek, Goldfield Association opposite 1 and 2 above and one below L. L. Bear Creek, Rich Association on Bear Creek, adjoining 2 Above Central Association, adjoining No. 1 Below on Central Creek, Discovery on Central Creek, One Above on Central Creek, One Below on Central Creek, Fraction (Garbin) on Central Creek, Discovery Claim on Jack Creek, a tributary of Klery; all interest of said first party in all mining claims owned in whole or in part in [102] Rocky Creek in said mining and recording District.

It is FURTHER ORDERED, ADJUDGED AND DECREED, that the defendants George Stanley and Sam Sallo are trustees for the defendants Andy Garbin and Jack Lesamis, respectively, and that said defendants Stanley and Sallo, by the conveyances made to them, took and now hold the legal title to the property described in said conveyances in trust for said defendants Andy Garbin and Jack Lesamis, and subject to the said indebtedness of the said Klery Creek Mining Company.



It is **FURTHER ORDERED, ADJUDGED AND DECREED**, that the United States Marshal for the District of Alaska, Second Division, sell, the whole of said assets, both personal and real above described, under order and execution of the Court in this action in the manner provided by law, and pay the proceeds of said sale to the clerk of the above-entitled court and that said clerk pay and distribute the said proceeds so received by him in the following manner:

1. The plaintiff's costs and expenses in this litigation.

2. The said indebtedness of the Klery Creek Mining Company to Robinson-Magids & Company or Philip Murphy, as assignee.

3. The balance of said proceeds, if any, to the defendants or their assigns, to the amount of \$18,761.81.

4. The balance of said proceeds, if any still remaining, to be distributed equally between the plaintiff and the defendants, Andy Garbin, Jack Lesamis, John Tyapay, or their assigns.

It is **FURTHER ORDERED, ADJUDGED AND DECREED**, that the plaintiff do have judgment and execution against the defendants and each of them for his costs and disbursements in this action, taxed at the sum of \$141.95 dollars.

Done in open court this 10th day of June, 1916.

J. R. TUCKER,  
District Judge.



Service of the foregoing amended decree admitted by receipt of copy this — day —, 1916.

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Of Attorneys for Defendants. [103]

[Endorsed]: No. 2349. In the District Court for the District of Alaska, Second Division. H. Greenberg, Plaintiff, vs. Jack Lesamis et al., Defendants. Amended Decree. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Jun. 10, 1916. G. A. Adams, Clerk. By W. C. McG., Deputy. Orders and Judgments, Vol. 11, page 252. J. F. Hobbes and W. A. Gilmore, Attorneys for Plaintiff. Jdmt. Docket #3, page, #12. [104]

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*In the District Court for the District of Alaska,  
Second Division.*

TERM MINUTES, General 1916 Term Beginning  
January 29, 1916.

Saturday, June 10, 1916, at 11 A. M.

Court convened pursuant to adjournment,—  
Honorable J. R. TUCKER, District Judge, Presiding.

Upon the convening of court the following proceedings were had:

No. 2349.

H. GREENBERG.

vs.

JACK LESAMIS et al.

**Minute Order of June 10, 1916.**

Court announced allowance of amended findings of fact and conclusions of law as presented by plaintiff.

Findings of fact signed and filed.

Amended decree signed and filed.

G. J. Lomen, counsel for defendants, and on behalf of defendants, took exceptions to allowance of both the findings of fact and conclusions of law and the decree.

Exceptions allowed.

On motion leave was granted to G. J. Lomen to withdraw the amended findings of fact and conclusions of law and decree submitted by him on behalf of defendants with leave to modify or amend same at discretion and refile.

Order made overruling the motion of the defendants to set aside the sale.

Exception taken by G. J. Lomen on behalf of the defendants, such exception being allowed.

Whereupon court adjourned until 11 A. M. Saturday, June 17, 1916. [105]

*In the District Court for the District of Alaska,  
Second Division.*

No. 2349.

H. GREENBERG,

Plaintiff,

vs.

JACK LESAMIS, JOHN TYAPAY, ANDY  
GARBIN, GEORGE STANLEY and SAM  
SALLO,

Defendants.

**Notice of Hearing Motion for Amended Findings  
and Decree.**

To J. F. Hobbes and William A. Gilmore, Attorneys  
for Plaintiff:

TAKE NOTICE that on Saturday, the 17th day  
of June, 1916, at 11 o'clock A. M., or as soon there-  
after as counsel can be heard, at the courthouse in  
Nome, Alaska, the defendants will move the court  
for amended findings and an amended decree herein,  
and for a reference to some suitable person to take  
an accounting herein as shown by the motion and  
affidavit hereto attached.

O. D. COCHRAN,

G. J. LOMEN,

Attorneys for Defendants Lesamis, Tyapay and  
Garbin. [106]

*In the District Court for the District of Alaska,  
Second Division.*

No. 2349.

H. GREENBERG,

Plaintiff,

vs.

JACK LESAMIS, JOHN TYAPAY ANDY GAR-  
BIN, GEORGE STANLEY and SAM  
SALLO,

Defendants.

**Motion for Amended Findings and Decree.**

Now come the defendants above named and move the Court upon the affidavit of G. J. Lomen hereto annexed and the records and files in said action, that the amended findings and amended decree herein be so amended as to conform to the opinion and mandate of the Circuit Court of Appeals herein as the same shall be judicially interpreted and according to their true intent, meaning and spirit, correcting patent errors therein appearing upon the face of the record. That whether such amended findings or amended decree be corrected or not, the Court make an order for reference in said cause to some suitable person to examine the accounts of the said copartnership heretofore existing between plaintiff and defendants and the cross-claims of said plaintiff and defendants not inconsistent with the findings and decree herein or inconsistent with the opinion and mandate of said Circuit Court of appeals and report to the Court the

present state of the business of said copartnership in a summarized form, with the value of its assets and liabilities and the accounts of each of said copartners with the said firm and with each other.

Said motion is based upon the grounds stated in said adavit and the records aforesaid and in order that justice may be done and a full settlement had between said parties.

O. D. COCHRAN,

G. J. LOMEN,

Attorneys for Defendants Lesamis, Tyapay and Garbin. [107]

*In the District Court for the District of Alaska,  
Second Division.*

No. 2349.

H. GREENBERG,

Plaintiff,

vs.

JACK LESAMIS, JOHN TYAPAY ANDY GAR-  
BIN, GEORGE STANLEY and SAM  
SALLO,

Defendants.

**Affidavit of G. J. Lomen.**

United States of America,  
Territory of Alaska,  
Second Division,—ss.

G. J. Lomen, being duly sworn, on oath deposes and says:

1st. That he is one of the attorneys for the defendants in the above-entitled action; that said action



was brought to dissolve the copartnership heretofore existing between said parties and for an accounting; that issue was joined therein on the complaint of the plaintiff, the separate answer of the defendants Lesamis, Tyapay and Garbin, the separate answer of defendants Stanley and Sallo, and the supplemental answer and cross-complaint of the defendants Stanley and Sallo.

2d. That among the issues raised in and by said pleadings were the following:

(a) The construction of the contract of sale, plaintiff contending that the balance of the purchase price was to be paid by the partnership from the net profits of the mining operations conducted by the partnership, and the defendants contending that the same was to be paid by plaintiff from the gross output of the undivided one-quarter of the claims purchased by him.

(b) Whether or not the mining claims were partnership property, and, impliedly, to what extent, if any, they were partnership property.

(c) Whether the mining in 1911 was conducted by plaintiff individually or by the partnership.  
[108]

(d) Whether the indebtedness to Robinson-Magids Co. was a partnership debt or the individual debt of plaintiff, and the amount of such indebtedness, if any.

(e) The several cross-claims of plaintiff and defendants growing out of said contract of sale and out of the partnership transactions, as well as the cross-claims of the defendants Stanley and Sallo, for and

on account of assessment work.

(f) The amount of the indebtedness of the partners to the partnership.

(g) The amount of the indebtedness of said partners each to the other.

(h) The amount of the indebtedness of said partnership to strangers.

(i) The amount of the indebtedness of the partnership to the partners or their assigns.

(j) The amount due from plaintiff to the several defendants on individual account and especially the purchase money due from plaintiff to the defendant.

(k) The liability of plaintiff for \$1,629.94 damages for conversion of gold-dust belonging to the defendants and appropriated by plaintiff.

(l) The claims of defendants for interest on balance of accounts due them.

3d. It was admitted by the findings that one M. F. Moran was indebted to the partnership in the sum of \$720.00.

It was admitted in the reply of plaintiff that he was a copartner in the firm of Robinson-Magids & Co., and that Philip Murphy, the assignee of Robinson-Magids & Co. was an employee and agent of said company; that it was not denied by plaintiff that the assignment of said claim was without consideration and it was expressly admitted in the reply of plaintiff that said [109] assignment was made for the purpose of collection and that the accounts assigned to Murphy were justly and legally due to Robinson-Magids & Co.

It was also admitted by plaintiff on the trial (folio

189), as follows: "Robinson-Magids & Company have no interest in the Klery Creek Mining Company and never had. I am liable to my partners personally for the indebtedness of the Klery Creek Mining Company; it is all charged up to me personally." (Testimony of plaintiff, folio 189.)

It was also admitted by plaintiff (folio 128) that Frank Lesamis is another creditor of the Klery Creek Mining Company to the extent of \$1,158.53, which amount was money borrowed from Frank Lesamis in 1911. (Testimony of plaintiff, folio 128.)

It was expressly found by the findings of the trial court that \$2,400.00 was due to the defendants and chargeable as indebtedness against the Klery Creek Mining Company, but that said finding was not carried forward to, or incorporated in, or noticed by the amended decree herein.

That the right to an accounting was not contested in said action, that both plaintiff and the defendants were actors in said action and asked for an accounting.

4th. That such proceedings were had in said action that findings of fact and conclusions of law were, on the 28th day of October, 1913, entered by said court dissolving the partnership known as the Klery Creek Mining Company and ordering and directing a sale of the partnership assets and the payment of the proceeds of sale to the clerk of said court for distribution; that the court in its findings found certain facts to serve as a basis for an accounting and made a partial accounting in said case and entered a decree based upon said findings, which decree was in part

interlocutory and in part final.

5th. That such proceedings were thereafter had that on the 10th day of August, 1914, the assets of said partnership mentioned [110] in the decree were sold by the United States Marshal; that the amount bid at such sale was \$3,000.00; that plaintiff was the highest and best bidder in said amount, but that the amount of said bid was never paid except the sum of \$107.07 thereof, being the costs of sale and that no part of said money so bid was ever delivered to the clerk of said court as provided by said decree; that the defendants objected to the confirmation of said sale on the ground that said bid was not paid, but that said sale was nevertheless confirmed.

6th. That such proceedings were thereafter had that defendants took an appeal from said decree and from the order confirming said sale to the Circuit Court of Appeals for the Ninth Circuit, but filed no supersedeas bond; that such proceedings were had in said appellate court that said decree of the trial court was reversed and modified in part and confirmed in part; that the opinion of said Circuit Court of Appeals is reported in 225 Federal Reporter, page 449, reference to which opinion is hereby made; that the mandate of said Circuit Court of Appeals dated September 10th, 1915, was duly filed in the office of the Clerk of said District Court on the 5th day of February, 1916; that in and by said opinion and mandate the said District Court was ordered and directed to modify and change its finding number eleven and to modify and amend its judgment or decree herein to conform to said opinion and mandate and that such



execution and further proceedings be had in said cause in accordance with said opinion and mandate as according to right and justice and the laws of the United States ought to be had.

7th. That the defendants thereupon petitioned the said District Court to amend its findings and decree in accordance with said opinion and mandate and specifically pointed out to said District Court certain clerical errors in matters of computation made in the findings of said District Court theretofore filed and which [111] errors and mistakes appear on the face of the record, but which neither these defendants nor their attorneys nor as affiant believes, the Circuit Court of Appeals observed or noticed; that said errors and mistakes were not called to the attention of affiant or his associates until long after the filing of said mandate; that affiant also called said Court's attention to certain errors in the matter of computation as he believes on the part of said Circuit Court of Appeals in the matter of adopting said erroneous findings of the trial court and in the matter of adjusting and apportioning another and different sum than by said Circuit Court of Appeals was declared to be the amount to be adjusted and apportioned and also as affiant believes was inconsistent with the law of the case as established by said Circuit Court of Appeals when it declared that the balance due for purchase money to be paid by plaintiff to the defendants was to be paid by him and not by the firm from the one-fourth gross of the output of the mining claims mentioned; that affiant also moved the court upon affidavit showing that the bid



made by plaintiff at the sale above mentioned, had not even now been paid, for an order setting aside said sale and the order confirming same.

8th. That thereupon and on the 10th day of June, 1916, the said District Court made and filed its amended findings of fact and conclusions of law herein and made and entered its decree upon said findings and denied the defendants' motion to set aside said sale and order confirming same to all of which defendants duly excepted.

9th. That the said amended findings and conclusions of law and said amended decree embraced the errors above specified as contained in said original findings and decree and in said opinion of the Circuit Court of Appeals; that neither of said findings or decrees covered or embraced all of the issues above mentioned and particularly did not cover, embrace or settle the said issues [112] mentioned in paragraph two, literae e, f, g, h, i, j, k and l above; and said findings did not cover or embrace the facts admitted by the pleadings and the evidence and mentioned in paragraph three hereof; that said amended decree herein was in substance and effect an interlocutory decree, calling for and contemplating an accounting and in terms granted "An accounting between plaintiff and defendants of all and every matter and thing arising under and by virtue of the mining copartnership known as the Klery Creek Mining Co. in accordance with said findings of the court heretofore made, filed and entered"; that the findings made and filed by said court did not, nor did any or either of them, make or complete any accounting be-

tween said parties except as to certain matters and things mentioned and which constituted but a partial accounting to wit, the liability of the parties to said Klery Creek Mining Company in the matter of its liability to Robinson-Magids & Co., and not otherwise; that said decree did not order or direct any reference or appoint any referee to take said accounting or to complete the same; that said amended decree so made and entered by said District Court was amended in other particulars than the matters and things set forth in finding number eleven mentioned in the opinion and mandate of the Circuit Court of Appeals, and although the assets of said partnership had been hold as above stated, said amended decree again decreed a sale of said assets and the distribution of the proceeds of such sale; that said amended decree does not purport to have been made or entered in obedience to any opinion or mandate of the Circuit Court of Appeals nor is said amended decree limited in its terms and provisions to the orders and directions of said opinion and mandate and said amended decree fails to provide for the distribution of the assets after sale, as ordered and directed in and by said opinion and mandate and fails to correct the errors and mistakes in the matters of computation of said courts above mentioned. [113]

That said decree imposes upon the Clerk of said court discretionary and judicial power with reference to the beneficiaries of the fund to be distributed, said beneficiaries being named in the disjunctive and one of said beneficiaries, if a partnership being named only by its firm name without showing who

the members of said partnership are.

That said amended decree makes no provision for the collection of the amounts found due from plaintiff and defendants or any or either of them.

The said amended findings and said amended decree adjusts and apportions a part of the one-quarter gross found to be due from plaintiff to defendants on account of purchase money, although it appears elsewhere in said decree that more than \$5,000 thereof had already been paid to defendants, and finds the amount due from plaintiff to the Klery Creek Mining Co. without reference to moneys withdrawn from the firm by him and without reference to his liability to said Klery Creek Mining Co. for and on account of the expenses incurred by said Klery Creek Mining Co. and the plaintiff's failure to contribute to said expenses.

It is not shown by said amended findings or decree who the creditors, Robinson-Magids & Co. are, whether a corporation or a partnership, and if the latter who constitute said partnership, and said decree in effect is a money judgment in favor of said Robinson-Magids & Co., although said Robinson-Magids & Co. are not made parties to said action, and said decree in effect orders execution of such money judgment although it appears in the findings that an action at law is now pending between said Robinson-Magids & Co., and the Klery Creek Mining Co. involving their said claim, and that in said law action a writ of attachment is issued out of said court against the partnership assets of the Klery Creek Mining Co., and that the sale of

said assets ordered in and by said amended decree was not decreed to be subject to said attachment nor was said attachment discharged; that said amended decree [114] is not justified by the findings and is contrary to law; that said amended decree is not justified by the opinion and mandate of the Circuit Court of Appeals for the Ninth Circuit filed herein and is contrary to law.

That the examination of a long intricate and complicated account, to wit, the accounts and business transactions of said copartnership and the individual dealings had between said partners in contemplation of said copartnership is necessary to a complete determination of the rights of the parties hereto.

That affiant makes this affidavit for the purpose of correcting the errors above mentioned and appearing on the face of the said findings and decree, and for the purpose of securing the order of said court appointing a referee to take an accounting between said parties as contemplated by said decree and the entry of a final decree upon the coming in and approval of the accounting so made, and for such other and further relief as to the Court may seem just in the premises.

G. J. LOMEN.

Subscribed and sworn to before me this 14th day of June, 1916.

[Seal]

D. B. CHACE,

Notary Public for the Territory of Alaska, Residing  
at Nome.

(My commission expires May 12th, 1917.) [115]



*In the Circuit Court for the District of Alaska,  
Second Division.*

TERM MINUTES, General 1916 Term Beginning  
January 29, 1916.

Saturday, June 17, 1916, at 11 A. M.

Court convened pursuant to adjournment,—  
Honorable J. R. TUCKER, District Judge, pre-  
siding.

Upon the convening of Court the following pro-  
ceedings were had:

**Minute Order of June 17, 1916.**

2349.

H. GREENBERG

vs.

JACK LESAMIS et al.

Defendant's motion for order of reference, etc.,  
taken up for hearing.

On request of G. J. Lomen he was permitted to  
amend his affidavit in support of motion by striking  
out the word findings and inserting instead the word  
reply in the first line in subdivision 3d on page 2  
of the affidavit.

Oral argument presented by G. J. Lomen on behalf  
of motion from 11 A. M. to 12:10 P. M.

Court adjourned until 2 P. M.

2 P. M.

Hearing continued.

Argument of G. J. Lomen continued from 2 P. M.



to 2:50 P. M., followed by argument of J. F. Hobbes, on behalf of plaintiff, until 3 P. M.

Closing argument submitted by G. J. Lomen.

Matter submitted and motion overruled.

G. J. Lomen on behalf of defendants taking and being allowed an exception.

Whereupon court adjourned until 11 A. M. Saturday, June 24, 1916. [116]

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*In the District Court for the District of Alaska,  
Second Division.*

No. 2349.

H. GREENBERG,

Plaintiff,

vs.

JACK LESAMIS, JOHN TYAPAY ANDY GAR-  
BIN, GEORGE STANLEY and SAM  
SALO,

Defendants.

**Assignment of Errors.**

Come now the defendants above named and assign the following errors upon which they will rely in prosecuting their appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the final judgment of said District Court made and entered, after mandate, on the 10th day of June, 1916, but dated as of the 28th day of October, 1913, and denominated an "Amended Decree" without referring to any mandate; and from the order of said Court dated June 10th, 1916, overruling the motion

of said defendants for amended findings and decree based upon the mandate and opinion of the Circuit Court of Appeals with necessary correction in the matter of errors of computation; and from an order overruling defendants' motion after entry of said amended findings and amended decree to reamend the findings and decree so as to conform to the mandate and opinion of the Circuit Court of Appeals, and to correct the manifest errors in matters of computation, and to take an account, dated June 17th, 1916; and from the whole of said amended judgment and decree and from the whole of said orders; also from the order of said Court dated June 17th, 1916, permitting the sale on execution to stand, and a satisfaction of the judgment, *pro tanto*, without payment of the bid made on [117] said sale, and without a deposit of same with the clerk of said court as directed by the judgment and decree, and from the whole of said order.

### I.

The Court erred in entering its amended decree herein and said decree is alleged to be erroneous in this:

1. It does not appear on its face to be entered under or by virtue of or in compliance with the mandate of the appellate court.
2. It is dated as of the date of the original decree and necessarily refers to and is based upon the findings upon which said original decree was entered, and does not refer to any amended findings after mandate, although the decree is denominated "Amended

Decree," and although said decree is modified in part in accordance with said mandate.

3. Said original findings, so referred to, were erroneous and so found to be by the appellate court and could not serve as the basis for the amended decree, nor do the said original or amended findings justify said amended decree, nor is said amended decree justified by the opinion, mandate, or amended findings filed herein.

4. The original and also the amended findings and amended decree embrace errors in computation which were not known or discovered until after the coming in of the mandate, but are patent on the face of the original findings and decree, and were carried into the opinion of the appellate court and into the amended findings and amended decree after mandate. Said error in computation consisted of errors in subtraction of each of the certain credits allowed to defendants Lesamis, Tyapay and Garbin from [118] the sum of \$4,828.73, being one-fourth of the debts of the partnership, the amounts of said credits being respectively \$737.89, \$463.89 and \$951.70; and, in deducting which credits, the Court made mistakes in the aggregate, amounting to \$1,015.02 in favor of the plaintiff. The trial court also erred in assuming that the amount due from each of the partners was one-fourth of the indebtedness due to the creditor, Robinson-Magids & Company, when it clearly appeared that their relations to the partnership were unequal in the matter of moneys expended and moneys withdrawn, and said debts only bore a partial

relation to, and did not depend upon, the amount due Robinson-Magis & Co.

5. The amended findings and decree were not amended according to the opinion and mandate, but recede from same, in that a distribution of proceeds of partnership property is directed to be made in payment of plaintiff's individual debt to defendants, on account of purchase money due, a thing that the opinion said should not be done; and said amended findings and decree failed to order or direct execution or payment by plaintiff of such individual debt, and failed to order or direct execution or payment of the debts found due from the partners to the firm, and on the other hand drew into the assets of the firm the individual liability of plaintiff to his partners without drawing into said assets his liability to the firm for money withdrawn by him from the net, or money due from him for failure to contribute to the expenses of the partnership,—the expenses, so far as made, coming from the gross output in which plaintiff could not share, and from moneys advanced by defendants.

6. The amended findings and decree are inconsistent and incomplete in that they fail to find or adjudge upon several material issues raised by the pleadings: e. g. (a) The debt of \$2,400 due to Stanley and Salo expressly mentioned in the findings was [119] not adjudicated. (b) The claims due the partnership are not included in the assets directed to be sold, such claims including royalties mentioned in the decree, the claim against M. F. Moran of \$720.00 mentioned in plaintiff's reply, and the debts due from



the individual partners to their firm. (c) The accounting was partial only, and contemplated a further accounting; and if not, the decree would be erroneous in that it did not treat all the parties to the action as "actors" and adjudicate on their respective rights. (d) The decree did not adjudicate in regard to the \$1,158.53 admitted by plaintiff to be due to Frank Lesamis for money borrowed and which was included in the "output" of 1911. (e) The decree contained no ordering or mandatory part nor did it provide for execution or payment of moneys found due except with reference to partnership property. (f) The decree found that "The plaintiff be and he is hereby granted an accounting between the plaintiff and defendants of all and every matter and thing arising under and by virtue of the mining copartnership known as the Klery Creek Mining Company in accordance with the findings of the court heretofore made, filed and entered," and does not specify, except by reference, the results of such special and partial accounting, nor does such reference to an accounting include other matters of account necessarily embraced within the material issues of the pleadings.

## II.

The Court erred in decreeing "That the plaintiff do have judgment as prayed for in his complaint herein," the same not being based upon or justified by the findings of the court and inconsistent with the findings and conclusions of law.

## III.

The Court erred in not taking an account of all



matters [120] between said parties and embraced within the issues of the pleadings and in refusing to appoint a referee to take such accounting, an accounting being contemplated by the terms of the decree.

#### IV.

The Court erred in finding as a fact that plaintiff had fulfilled and carried out the terms, covenants and conditions on his part to be made, done, kept and performed, it appearing from the mandate that such was not the case.

#### V.

The Court erred in not including among the assets of the partnership the debt due from M. F. Moran of \$720.00 and by the reply admitted to be due, nor the royalties mentioned in the findings, nor the debts due from the partners.

#### VI.

The Court erred in not including in the amount due from plaintiff the moneys withdrawn by him from the partnership and applied on his own individual account to defendants, to wit: \$5,238.19, and in not charging said plaintiff with any of the expenses of said mining copartnership.

#### VII.

The Court erred in deducting from plaintiff's one-quarter of the gross output, one-fourth of the net profits for the year 1910, it appearing that he had not paid for his share of the capital stock of the partnership. (Difference between \$6,509.57 ( $\frac{1}{4}$  gross output) and the  $\frac{1}{4}$  net, \$1,847.92=\$4,661.66, the amount "adjusted.")

## VIII.

The Court erred in failing to adjudicate in regard to the several cross-claims of the plaintiff and defendants whether [121] on partnership or individual account, and, to the extent that such claims were adjudicated, the Court failed to decree collection or payment of the respective amounts found due one from the other.

## IX.

The Court erred in embracing within the accounting by it made, the transaction of 1910, said account being closed and the net profits disposed of, in so far as subsequent creditors were concerned.

## X.

The Court erred in not taking note of the fact that plaintiff was a partner of the firm of Robinson-Magids & Company and in not adjudicating with reference thereto when it was found by the Court that plaintiff was a debtor to the partnership and he himself a member of the creditor company so that, to the extent of his payment of the partnership debt, he would pay *pro tanto* to himself.

## XI.

The Court erred in awarding costs against the defendants personally, the Court having adjudged that the same be paid from the proceeds of the sale of the partnership property.

## XII.

The Court erred in overruling defendants' motion on petition for amended findings and amended decree after mandate as prayed for in the petition.

## XIII.

The Court erred in overruling the defendants' motion to amend the amended findings and amended decree after mandate to [122] appoint a receiver and to take an account.

## XIV.

The Court erred in overruling the defendants' motion to vacate the sale on execution and in granting plaintiff's motion to allow the sale on execution to stand, without compliance with the decree and without payment of the amount bid, plaintiff being the bidder, and Robinson-Magids & Co. the "judgment" (?) creditor.

O. D. COCHRAN,

G. J. LOMEN,

Attorneys for Defendants.

[Endorsed]: #2349. In the District Court for the District of Alaska, 2d Division. H. Greenberg, Plaintiff, vs. Jack Lesamis, John Tyapay, Andy Garbin, George Stanley and Sam Salo, Defendants. Assignment of Errors. Filed in the Office of the Clerk of of the District Court of Alaska, Second Division, at Nome. Jun. 5, 1917. G. A. Adams, Clerk. By W. C. McG., Deputy. O. D. Cochran and G. J. Lomen, Attorneys for Defendants. [123]

*In the District Court for the District of Alaska,  
Second Division.*

No. 2349.

H. GREENBERG,

Plaintiff,

vs.

JACK LESAMIS, JOHN TYAPAY, ANDY  
GARBIN, GEORGE STANLEY and SAM  
SALO,

Defendants.

**Petition for Order Allowing Appeal.**

Come now the defendants above named and feeling themselves aggrieved by the final judgment and decree made and entered in the above-entitled cause on the 10th day of June, 1916, but dated as of the 28th day of October, 1913, and denominated an "Amended Decree" in favor of the plaintiff and against the defendants, for a dissolution of partnership and an accounting, do hereby appeal from said final judgment and decree and from the whole and every part thereof, and do also appeal from the order of said court dated June 10th, 1916, overruling the motion of said defendants for amended findings and decree based upon the mandate and opinion of the Circuit Court of Appeals for the Ninth Circuit, with necessary corrections on account of errors of computation and from the order of said court dated June 17th, 1916, overruling the defendants' motion after entry of said amended decree to reamend the

findings and decree so as to conform to the mandate and opinion of the Circuit Court of Appeals and to correct the manifest errors in matters of computation and to take an account; also from the order of said court dated June 17th, 1916, permitting the sale on execution to stand and a satisfaction of the judgment *pro tanto* without payment of the bid made on said sale under said execution, and from the whole of said orders, to the United States Circuit [124] Court of Appeals for the Ninth Circuit and they pray that these their appeals may be allowed and that a transcript of the record and proceedings upon which said judgment and orders were made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that said Court approve the bond on appeal herein in the sum of Two Hundred and Fifty (\$250) Dollars.

Dated at Nome, Alaska, this 5th day of June, 1917.

O. D. COCHRAN and  
G. J. LOMEN,

Attorneys for Defendants.

Service of the foregoing, admitted this 5th day of June, 1917.

J. F. HOBBS,

Of Attorneys for Plaintiff.

[Endorsed]: #2349. In the District Court for the District of Alaska, 2d Division. H. Greenberg, Plaintiff, vs. Jack Lesamis et al., Defendants. Petition for Order Allowing Appeal. Filed in the Office of the Clerk of the District Court of Alaska, Second



Division, at Nome. Jun. 5, 1917. G. A. Adams, Clerk. By W. C. McG., Deputy. O. D. Cochran and G. J. Lomen, Attorneys for Defendants. [125]

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*In the District Court for the District of Alaska,  
Second Division.*

No. 2349.

H. GREENBERG,

Plaintiff,

vs.

JACK LESAMIS, JOHN TYAPAY, ANDY  
GARBIN, GEORGE STANLEY and SAM  
SALO,

Defendants.

**Order Allowing Appeal.**

Upon motion of O. D. Cochran and G. J. Lomen, attorneys for defendants above named, it is

ORDERED, that the appeals to the United States Circuit Court of Appeals for the Ninth Circuit, (1) from the final judgment and decree made and entered in the above-entitled cause on the 10th day of June, 1916, but dated as of the 28th day of October, 1913, and denominated an "Amended Decree" in favor of the plaintiff and against the defendants for a dissolution of partnership and an accounting; (2) from the order of said court dated June 10th, 1916, overruling the motion on petition of said defendants for amended findings and decree based upon the mandate and opinion of the Circuit Court of Appeals with necessary corrections on account of errors of

computation; (3) from the order dated June 17th, 1916, overruling defendants' motion on affidavit after entry of said amended decree to reamend the findings and decree so as to conform to the mandate and opinion of the Circuit Court of Appeals and to correct manifest errors in matters of computation and to take an account; (4) from the order dated June 17th, 1916, permitting the sale on execution to stand and a satisfaction of the judgment *pro tanto* without payment of the bid made on said sale under said execution, and from [126] the whole of said orders, are hereby allowed.

IT IS FURTHER ORDERED that the motions, petition and affidavits above referred to and the proceedings had thereon, including minute orders and exceptions noted, are hereby made a part of the record herein, including the mandate, and that a transcript of said record, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, as the record herein.

Done in open court this 5th day of June, 1917.

J. R. TUCKER,  
District Judge.

[Endorsed]: #2349. In the District Court for the District of Alaska, 2d Division. H. Greenberg, Plaintiff, vs. Jack Lesamis et al., Defendants. Order Allowing Appeals. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Jun. 5, 1917. G. A. Adams, Clerk. By W. C. McG., Deputy. O. D. Cochran and G. J. Lomen, Attorneys for Defendants. Orders and Judgments. Vol. 11, page 373. C. [127]

*In the District Court for the District of Alaska,  
Second Division.*

No. 2349.

H. GREENBERG,

Plaintiff,

vs.

JACK LESAMIS, JOHN TYAPAY, ANDY  
GARBIN, GEORGE STANLEY and SAM  
SALO,

Defendants.

**Undertaking on Appeal.**

KNOW ALL MEN BY THESE PRESENTS, that we, Jack Lesamis, John Tyapay, Andy Garbin, George Stanley and Sam Salo, as principals, and A. N. Kittilsen and Alfred J. Lomen, as sureties, are held and firmly bound unto the plaintiff in the sum of Two Hundred and Fifty (\$250) Dollars, to be paid to the said plaintiff, his heirs or assigns, for the payment of which well and truly to be made, we bind ourselves, our and each of our heirs, executors, administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 5th day of June, 1917.

The condition of the above undertaking and obligation is such that, WHEREAS, the above-named defendants have filed their petition for appeals from the final judgment and decree made and entered in the above-entitled cause on the 10th day of June,

1916, but dated as of the 28th day of October, 1913, and denominated an "Amended Decree" in favor of the plaintiff and against the defendants for a dissolution of partnership and an accounting; from the order of said [128] court dated June 10th, 1916, overruling the motion of said defendants for amended findings and decree based upon the mandate and opinion of the Circuit Court of Appeals with necessary corrections on account of errors of computation and from the order of said court dated June 17th, 1916, overruling the defendants' motion after entry of said amended decree to reamend the findings and decree so as to conform to the mandate and opinion of the Circuit Court of Appeals and to correct manifest errors in matters of computation and to take an account; also from the order of said court dated June 17th, 1916, permitting the sale on execution to stand and a satisfaction of the judgment *pro tanto* without payment of the bid made on said sale under said execution and from the whole of said orders and have taken an appeal from said judgment and orders to the United States Circuit Court of Appeals and from the whole of said judgment and orders, to reverse the same;

NOW, THEREFORE, if the above-named defendants Jack Lesamis, John Tyapay, Andy Garbin, George Stanley and Sam Salo, shall prosecute their said appeals to effect, and answer all costs if they fail to make good their said appeals, then this obli-

gation shall be void; otherwise to remain in full force and effect.

JACK LESAMIS,  
JOHN TYAPAY,  
ANDY GARBIN,  
GEORGE STANLEY,  
SAM SALO,

Principals.

By G. J. LOMEN,

Their Attorney.

A. N. KITTILSEN,  
ALFRED J. LOMEN,

Sureties. [129]

United States of America,  
Territory of Alaska,  
Second Division,—ss.

A. N. Kittilsen and Alfred J. Lomen, being duly sworn, each for himself and not one for the other, deposes and says:

That he is a resident of Nome in the Territory of Alaska, and one of the sureties mentioned above; that he is not a counselor or attorney at law, marshal, deputy marshal, commissioner, clerk of any court or other officer of any court; that he is worth the sum of Two Hundred and Fifty (\$250) Dollars over and above all just debts and liabilities and exclusive of property exempt from execution.

ALFRED J. LOMEN.

A. N. KITTILSEN.



Subscribed and sworn to before me this 5th day of June, 1917.

[Seal]

O. D. COCHRAN,  
Notary Public for the Territory of Alaska, Residing  
at Nome, Alaska.

(My commission expires Aug. 4, 1919.)

The above and foregoing bond is hereby approved  
this 5th day of June, 1917.

J. R. TUCKER,  
District Judge.

[Endorsed]: #2349. In the District Court for the District of Alaska, 2d Division. H. Greenberg, Plaintiff, vs. Jack Lesamis et al., Defendants. Undertaking on Appeal. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Jun. 5, 1917. G. A. Adams, Clerk. By W. C. McG., Deputy. O. D. Cochran and G. J. Lomen, Attorneys for Defendants. [130]

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*In the District Court, for the District of Alaska,  
Second Division.*

No. 2349.

H. GREENBERG,

Plaintiff,

vs.

JACK LESAMIS et al.,

Defendants.

**Clerk's Certificate to Transcript of Record.**

I, G. A. Adams, Clerk of the District Court of Alaska, Second Division, do hereby certify that the

foregoing typewritten pages, from 1 to 130, both inclusive, are a true and exact transcript of the Complaint in Equity, Summons, Separate Answer of George Stanley and Sam Sallo, Separate Answer of Jack Lesamis, John Tyapay and Andy Garbin, Reply to Separate Answer of Jack Lesamis, John Tyapay and Andy Garbin, Reply to Separate Answer of George Stanley and Sam Sallo, Supplemental Answer and Cross-complaint, Reply and Answer to Supplemental Answer and Cross-complaint of George Stanley and Sam Sallo, Opinion, Dated October 21st, 1913, Findings of Fact and Conclusions of Law, Decree, Mandate, Notice, Motion and Petition filed May 20, 1916, Minute Order, May 27th, 1916, Amended Findings of Fact and Conclusions of Law, Amended Decree, Minute Order June 10th, 1916, Notice, Motion and Petition filed June 14th, 1916, Minute Order June 17th, 1916, Assignment of Errors, Petition for Order Allowing Appeal, Order Allowing Appeal, Undertaking on Appeal, in the case of H. Greenberg, Plaintiff, vs. Jack Lesamis et al., Defendant, No. 2349, this Court, and of the whole thereof, as appears from the records and files in my office at Nome, Alaska; and further certify that the original Citation, Order Enlarging Time to file Record, dated June 5th, 1917, and Order Enlarging Time to File Record dated July 14th, 1917, in the above-entitled cause are attached to this transcript.

Cost of transcript \$50.60, paid by G. J. Lomen, of attorneys for defendant.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court this 2d day of August, A. D. 1917.

[Seal]

G. A. ADAMS,  
Clerk. [131]

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*In the District Court for the District of Alaska,  
Second Division.*

No. 2349.

H. GREENBERG,

Plaintiff,

vs.

JACK LESAMIS, JOHN TYAPAY, ANDY GARBIN,  
GEORGE STANLEY and SAM  
SALO,

Defendants.

**Citation.**

United States of America,  
Territory of Alaska,  
Second Division,—ss.

The President of the United States of America, to  
H. Greenberg, the Above-named Plaintiff,  
GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held in the City of San Francisco, in the State of California, within thirty (30) days from the date of this citation, to wit, on the 5th day of July, 1917, pursuant to an order allowing the appeals herein entered in the office of the Clerk of

the United States District Court for the District of Alaska, Second Division, from the final judgment and decree made and entered in the above-entitled cause on the 10th day of June, 1916, but dated as of the 28th day of October, 1913, and denominated an "Amended Decree," in favor of the plaintiff and against the defendants, for a dissolution of partnership and an accounting; from the order dated June 10th, 1916, overruling the motion of said defendants for amended findings and decree based [132] upon the mandate and opinion of the Circuit Court of Appeals with necessary corrections on account of errors of computation; from the order dated June 17th, 1916, overruling the defendants' motion after entry of said amended decree to reamend the findings and decree so as to conform to the mandate and opinion of the Circuit Court of Appeals and to correct manifest errors in matters of computation and to take an account; also from the order dated June 17th, 1916, permitting the sale on execution to stand and a satisfaction of the judgment *pro tanto* without payment of the bid made on said sale under said execution, and from the whole of said orders; in that certain action wherein you, the said H. Greenberg, are plaintiff, and Jack Lesamis, John Tyapay, Andy Garbin, George Stanley and Sam Salo are defendants, to show cause, if any there be, why the said final judgment and orders rendered against said defendants should not each and all be corrected, and why speedy justice should not be done to the parties in that behalf.



WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States of America, this 5th day of June, 1917, and of the Independence of the United States, the one hundred and forty-first.

J. R. TUCKER,  
District Judge.

Attest my hand and the seal of the United States District Court for the District of Alaska, Second Division, at the Clerk's office at Nome, Alaska, this 5th day of June, 1917.

[Seal] J. A. ADAMS,  
Clerk of the District Court for the District of Alaska,  
2d Division.

Service of the foregoing Citation is hereby admitted this 5th day of June, 1917.

By J. F. HOBBS,  
Attorney for Plaintiff. [133]

[Endorsed]: #2349. In the District Court for the District of Alaska, 2d Division. H. Greenberg, Plaintiff, vs. Jack Lesamis et al., Defendants. Citation. [134]

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*In the District Court, for the District of Alaska,  
Second Division.*

No. 2349.

H. GREENBERG,

Plaintiff,

vs.

JACK LESAMIS, JOHN TYAPAY, ANDY GARBIN,  
GEORGE STANLEY and SAM  
SALO,

Defendants.



**Order Enlarging Time to August 4, 1917, to File  
Record.**

On motion of O. D. Cochran and G. J. Lomen, attorneys for defendants, and good cause appearing to the Court therefor, it is now hereby

ORDERED that the time for filing and docketing the transcript and record on the appeals in the above-entitled cause in the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, is hereby extended to the 4th day of August, 1917.

Done in open court this 5th day of June, 1917.

J. R. TUCKER,  
District Judge, [135]

[Endorsed]: #2349. In the District Court for the District of Alaska, 2d Division. H. Greenberg, Plaintiff, vs. Jack Lesamis, et al., Defendants. Order Enlarging Time to File Record. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Jun. 5, 1917. G. A. Adams, Clerk. By W. C. McG. Deputy. Orders & Judgments, Vol. 11, page 374c. [136]

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*In the District Court, for the District of Alaska,  
Second Division.*

No. 2349.

H. GREENBERG,

Plaintiff,

vs.

JACK LESAMIS et al.,

Defendants.

**Order Enlarging Time to September 1, 1917, to File Record.**

On motion of O. D. Cochran and G. J. Lomen, attorneys for defendants, and good cause appearing to the Court therefor, it is now hereby

ORDERED that the time for filing and docketing the transcript and record on the appeals in the above-entitled cause in the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California is hereby extended to the first day of September, 1917.

Done in open court this 14th day of July, 1917.

J. R. TUCKER,

District Judge. [137]

[Endorsed]: #2349. In the District Court for the District of Alaska, 2d Division. H. Greenberg, Plaintiff, vs. Jack Lesamis, et al., Defendants. Order Enlarging Time to File Record. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Jul. 20 1917. G. A. Adams, Clerk. By W. C. McG. Deputy. Orders & Judgments, Vol. 11, page 378. [138]

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[Endorsed]: No. 3034. United States Circuit Court of Appeals for the Ninth Circuit. Jack Lesamis, John Tyapay, Andy Garbin, George Stanley and Sam Salo, Appellants, vs. H. Greenberg, Appellee. Transcript of Record. Upon Appeal

from the United States District Court for the District of Alaska, Second Division.

Filed August 22, 1917.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.



No. 3034 10

IN THE  
**United States Circuit Court of Appeals**  
**For the Ninth Circuit**

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JACK LESAMIS, JOHN TYAPAY,  
ANDY GARBIN, GEORGE STANLEY  
and SAM SALLO,

*Appellants,*

VS.

H. GREENBERG,

*Appellee.*

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**BRIEF FOR APPELLANTS.**

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O. D. COCHRAN,

G. J. LOMEN,

*Attorneys for Appellants.*





No. 3034

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

JACK LESAMIS, JOHN TYAPAY,  
ANDY GARBIN, GEORGE STANLEY  
and SAM SALLO,

*Appellants,*

VS.

H. GREENBERG,

*Appellee.*

## BRIEF FOR APPELLANTS.

### Statement of the Case.

The plaintiff, appellee herein, brought this action for the dissolution of a mining copartnership and for an accounting. An opinion, findings of fact, conclusions of law, and a decree were filed and entered. Defendants appealed. This court modified and affirmed the decree of the lower court (Lesamis et al. v. Greenberg, 225 Fed. 449). This is the second appeal.

By the opinion and mandate of the appellate court the basis for the account established by the trial court was found to be erroneous. The appel-

late court undertook to recast the account on a new basis, theory and construction established by it, but in so doing inadvertently overlooked certain errors in computation made by the trial court and incorporated them in their findings. The appellate court also inadvertently overlooked and neglected to make certain charges against plaintiff necessarily to be made under and by reason of said new basis for the account.

It will be remembered that the defendants Lesamis, Tyapay and Garbin, were the owners of certain mining claims; that plaintiff Greenberg bought a quarter interest in the same for \$30,000; he paid \$6000 down; the balance, \$24,000, as specified in the deed, was "to be paid of the first money taken out of the ground". The trial court had decided that the fourth interest purchased by Greenberg was to be paid for by applying to this purpose the entire net proceeds of the mining claims. The appellate court decided that payment for the Greenberg interest was to be made by applying thereto the gross gold output of the Greenberg fourth interest. The said parties formed a mining copartnership, known as the Klery Creek Mining Company. In 1910 the gross output of their mining was \$16,351.42, and the expenses, \$8959.75, leaving a net profit of \$7391.67. Plaintiff took the net profits, and, adopting the erroneous basis for accounting, also adopted by the trial court, he paid from said net profit to Lesamis \$1726.00, to Garbin \$1512.12, and to Tyapay \$2000.00, in reduction of purchase

money due, in all, \$5238.12 (Tr. 106); the balance of said net profit he turned over to Robinson-Magids Company, of which firm he was a member, as an advance towards expenses of the following year. By reason of said payments and advances, said firm extended credits to defendants as follows: To Lesamis \$737.89 (Tr. 106), Tyapay \$463.89 (Tr. 106), and Garbin \$951.70 (Tr. 106).

It would thus appear that all the expenses for the year 1910, including Greenberg's share thereof, had been paid from the gross output during that year, which gross output under the construction and basis for accounting established by the appellate court all belonged to the defendants, who, in fact, therefore, paid all the expenses. Plaintiff contributed nothing towards expenses in 1910, and withdrew from the partnership, of net profits, said \$5238.19 and used same to reduce his individual debts to his partners. This he could properly do on the theory of the trial court, but could not do on the theory of the appellate court.

In 1911 the total output as found by the court was \$9786.88 which amount, however, embraced not only the gold output for that year, but also the credits extended to defendants in 1910 above mentioned, and also the sum of \$1158.53 borrowed from Frank Lesamis, and admitted by plaintiff (Tr. folio 128 of record on former appeal). The total expenses of the partnership for 1911 was \$26,271.70 (Tr. 106), all found to be due to Robinson-Magids & Company, who received and applied on their said

account the said so-called output of \$9786.88, leaving a balance due them as found by the trial court of \$16,484.82 and interest (Tr. 106). Thus it appears that in 1911 the defendants paid towards expenses for that year their credits above mentioned, and all of the gross output of 1911, to which they alone were entitled, and that, again, plaintiff failed to contribute one cent towards expenses. The plaintiff, therefore, owed the partnership his one-quarter of all expenses and the moneys withdrawn from the net of 1910, and, of course, owed defendants a sum equal to his one-quarter of the gross. The trial court undertook to deduct the credits above mentioned from the liabilities of defendant (Tr. 64, 65), and by errors in subtraction aggregating \$1015.11 found to be due from

Lesamis,	\$4,429.21	instead of	\$4,090.84
Tyapay	4,703.21	instead of	4,364.84
Garbin	4,215.40	instead of	3,877.03
Greenberg	5,967.10	instead of	6,982.21
	<hr/>		
	\$19,314.92		\$19,314.92

said totals being the indebtedness of the partnership found to be due to Robinson-Magids Company, including interest.

The appellate court built its computation upon said erroneous balances, a fact not discovered by defendants until after mandate. But, further:

The appellate court, in adjusting and recasting the account under the new basis for the account established by it, "as the business of the firm resulted in a deficit", proceeded to ascertain the



amount due from each of the partners to the firm, and, in such "adjustment", building on the erroneous figures of the trial court first found the amount of the one-quarter gross output for both years, to which defendants were entitled on account of purchase money due from plaintiff, but deducted therefrom one-quarter of the net profits of 1910 (why?), leaving a balance of \$4661.66 (225 Fed. 452). Instead of ordering this to be paid to the defendants, the court increased the plaintiff's liability to the partnership by said amount without deducting from the figures of the trial court the amount erroneously credited to him by reason of the same fund, and reduced the liability of each of the defendants by one-third of said amount, \$1553.88, and thus, without any consent of the parties, or discharge by the creditor effected a quasi equitable novation, without any mandatory order in regard to payments. The appellate court in its statement of account, overlooked the moneys withdrawn by plaintiff from the firm, which were applied on his individual indebtedness to his partners, and further overlooked the fact that plaintiff, not sharing in the gross for any such purpose, had not contributed one cent towards the expenses of the partnership. Plaintiff's liability to his partners was one-quarter of the gross output and his liability to the firm was one-quarter of the expenses and the moneys withdrawn by him from net profits. The trial court had already credited plaintiff with his share of the gross in reduction of partnership debts. Should not this be charged

back to the plaintiff and allowed to defendants? If so, this could not be done by building on the figures of the trial court. On the coming in of the mandate the defendants by petition sought to have above errors, all of them apparent on the face of the record, corrected; but the trial court, believing that it was bound by a literal construction of the mandate, refused to make the correction, and made new findings and entered an amended decree, as it believed, in conformity with the mandate.

The defendants, conceiving that the corrections should be made on motion after such entry, and conceiving that aside from the errors above mentioned, other matters, including further accounting, were left open by the mandate, filed a motion upon affidavit for such corrections and further accounting, which motion was denied, and exceptions allowed (Tr. 117, 129).

It appearing also that plaintiff, who was the bidder at the execution sale of the partnership property was still in default in the payment of the amount bid on said sale, \$3000.00 (Tr. 122), the defendant further moved that the sale be set aside, which motion was also denied, and exception allowed. Some provision for payment and distribution of this money should be provided for.

The present appeals are from the amended decree after mandate; from the order of the District Court denying defendants' petition for entry of judgment and correction of errors of computation, etc.; from the order of the court denying defendants' motion

to correct and amend the amended findings and amended decree, and to correct patent errors in computation and for further accounting; and from the order refusing to vacate the sale on execution.

The questions involved, therefore, are,

1. Do the present appeals lie to correct manifest errors in the decree, after mandate, it appearing that such consist in the particulars assigned as error, to wit: (a) Misconstruction of the mandate and opinion as to the facts and as to the law of the case; (b) failure to follow the opinion and mandate; (c) errors in matter of computation apparent on the face of the record, and not denied, and undiscovered until after the filing of the mandate; (d) inconsistencies in and incompleteness of the decree; (e) failure to grant material and appropriate relief within the material issues of the pleadings and outside of the mandate and not adjudicated by the original decree, or by the opinion and mandate of the appellate court.

2. Does the amended decree show reversible error? (See specifications.)

3. Did the trial court err in refusing to appoint a referee and to order a further accounting? Appellants claim that the decree contemplated this.

4. Did the trial court err in refusing to vacate the sale on execution?

### Specification of Errors.

The decree appealed from is erroneous in this:

1. It does not show entry pursuant to the mandate.

2. It does not appear to be entered upon the amended findings.

3. It does not comply with the mandate and is inconsistent with the findings, the opinion of the appellate court and with said mandate.

4. It follows findings erroneous in matter of computation, apparent on the face of the findings, which errors in computation to wit, in the subtraction of the certain credits, mentioned in the findings from the one-quarter of the indebtedness from the partnership found due to Robinson-Magids Company, \$4828.73 and in which subtractions the mistakes aggregated the sum of \$1015.11, and which errors in subtraction were inadvertently carried into the original decree and into the opinion and mandate of the appellate court and into the amended findings and amended decree, and which errors are not denied.

5. The amended findings and amended decree assumed that the only indebtedness of the partners to the partnership was the indebtedness of the partnership to Robinson-Magids & Company, when it necessarily appears that the appellee, Greenberg, was indebted to said partnership for moneys withdrawn and for his share of the expenses unpaid, and when it further appeared from the findings



that the partnership was indebted to defendants Stanley and Sallo in the sum of \$2400.00 (Tr. 106) and to Frank Lesamis in the sum of \$1158.53 (Tr. 121).

6. The amended findings and amended decree recede from the opinion and mandate of the Circuit Court of Appeals in this: That a distribution of proceeds of partnership property is directed to be made in payment of the individual debt of the appellee for purchase money due when the opinion clearly states that this is not to be done, and apporitions the individual debt of plaintiff to his partners as an asset of the firm.

7. The amended findings and amended decree fail to order or direct execution or payment of the debts found due from the partners to the firm.

8. The amended findings and amended decree fail to adjudicate all the material issues raised by the pleadings and fail to adjudicate the amount due from one partner to the other.

9. The amended findings and amended decree embody apparent error in the opinion of the appellate court in failing to observe that with the new basis for an accounting by the appellee to his partners on account of purchase money due them, it became necessary also to charge said appellee with his share of expenses, which was not necessary to be done, and which was not done, under the theory or basis for such accounting made by the trial court, and which necessity the appellate court inadvertently overlooked.



10. The amended decree failed to adjudicate the amount due to Stanley and Sallo, to wit: \$2400, mentioned in the findings (Tr. 106).

11. The amended decree failed to adjudicate with reference to the claim against M. F. Moran, \$720.00 admitted by the reply to be due to the partnership (Tr. 32).

12. The amended decree contemplated a further accounting and to that extent was not final and it did not treat all the parties to said action as actors and did not adjudicate their respective rights.

13. The amended decree did not adjudicate in regard to an item of \$1158.53 admitted by appellee to be due to one Frank Lesamis for money borrowed by the partnership and which amount was included in the so-called output of 1911.

14. The amended decree contained no order or mandatory part nor did it provide for execution or payment of moneys found due except with reference to the partnership property.

15. The amended decree was erroneous in this: That it ordered and decreed "That the plaintiff do have judgment as prayed for in his complaint herein" the same not being based upon or justified by the findings of the court and not consistent with the findings and conclusions of law, the said complaint tendering an account of all matters and things relating to said partnership and relating to the dealings of one partner with the firm and of one partner with the other concerning which the decree was silent, except in part.

16. The court erred in refusing to appoint a referee and in refusing to take an accounting and in overruling appellants' motion in that behalf.

17. The court erred in that it was inconsistent with the findings of fact and with the opinion and mandate of the appellate court to decree that the appellee had fulfilled and carried out the terms, covenants and conditions by him to be kept and performed under the partnership agreement and his agreement of purchase.

18. The amended decree was erroneous in this: that in the amount found due from appellee *to the partnership was not included* moneys (\$5238.19) withdrawn by him from the net profits of 1910, which the trial court in its original findings and decree upon an erroneous construction of the contract (deed), allowed to be applied on purchase money due from him to appellants; and, also, in this: that in said amount found due from appellee to the partnership *was not included* sums equal to his one-quarter of the expenses found to have been incurred (\$8959.75 for 1910, and \$26,271.00 for 1911) and which it became necessary to include, after the theory of the trial court had been reversed; because by said reversal the appellee's one-quarter of the gross output (\$16,351.42 in 1910 and \$9786.88 in 1911) was to be applied in payment of purchase money due to appellants, and could no longer be credited to appellee on his expenses, as was done by the trial court. To the extent that the gross output was applied on expenses of the partnership

the same should have been *wholly* credited to appellants and plaintiff charged with a like sum. The erroneous credit of one-fourth of output given appellee by the trial court in its original findings and decree, was also carried into the amended findings and decree as well as the "adjustment" of the appellate court. The appellate court inadvertently built its "adjustment" not only on these errors of the trial court but also on the error in computation above mentioned.

19. The amended decree was erroneous and inconsistent in that it awarded costs against the defendants personally after providing for the payment of said costs from the proceeds of the sale of the partnership property (Tr. 113, 108).

20. The court erred in overruling the motion of the appellants to vacate the sale on execution, it appearing that the partnership property was bid in by the appellee but that no part of his bid was paid (Tr. 122).

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### Argument.

Some of the errors pointed out might have been made on a reargument, if seasonably discovered. Alaska is too far from San Francisco to make such discovery in time; but, ample authority for a remedy by second appeal, involving the questions above presented, is to be found:

If there arises a dispute over the proper interpretation or application of an opinion or mandate,

or if the court does not follow the law in the case, or misconstrues the mandate, or fails to give appropriate relief outside of the mandate, or fails to correct errors in computation, the remedy of the complaining parties is by second appeal.

*3 Cyc.*, 490 and cases cited;

*In re Marks*, 136 Fed. 168;

*Great Northern Ry. Co. v. Western Union T. Co.*, 174 Fed. 323;

*In re Sanford Fork & Tool Co.*, 16 S. Ct. 291.

In the latter case it was held that

“On a new appeal it is for this (the appellate) court to construe its own mandate and to act accordingly.

“To say that a court may not correct its own mistakes is to push it to an absurd conclusion \* \* \* By following the opinion the trial court never technically errs. When the case again comes before the appellate court the question is not, did the trial judge proceed according to the opinion, but were his rulings correct in law? To enforce erroneous rulings simply because the appellate court had directed the error, would be to pervert the law and sacrifice justice to the technicality of practice.”

*Hastings v. Foxworthy*, 34 L. R. A. 321  
(Neb.);

*Adams Co. v. R. R. Co.*, 55 Iowa 94.

“Errors in the entry, either of the findings or of the judgment, may be corrected by the court during the term at which the same was entered. Errors, however, that appear clearly on the face of the record, may be corrected after term time \* \* \* This power is not dependent on statute and may be exercised in term time or



vacation by the same judge or his successor, and even after the death of the parties.”

*10 M. A. L.*, 162, 531.

“If the findings contain an erroneous statement of the entire sum due, it would not be controlling, and the judgment should be given upon a corrected computation. The want of a computation, when the basis for giving it is given, is of no significance.”

*Metcalf v. City of Watertown*, 68 Fed. 859.

“The court is not, under all circumstances, bound to render a servile obedience to the mandate of the Supreme Court. It is bound to exercise a judicial discretion in the interpretation and execution of the mandate.”

*The Sabine*, 50 Fed. 215.

“It is to be interpreted according to the subject matter to which it has been applied and not in a manner to do injustice \* \* \* The obedience to the mandate should be an intelligent and not a blind obedience.”

*Story v. Livingston*, 13 Pet. 373; 10 L. Ed. 200.

The mandate should not be strictly followed so as to work a manifest injustice where it appears to have been framed upon a misapprehension.

*Baltimore etc. R. Co. v. Mackay*, 157 U. S. 72; 15 S. Ct. 491.

“The better rule and that more in accord with justice is that though ordinarily a question considered and determined on the first appeal is deemed to be settled and not open to re-examination on a second appeal, it is not an inflexible rule, and if the prior decision is palpably



erroneous, it is competent for the court to correct it on the second appeal. This may be said to be the view which has for its support the trend of many authorities \* \* \* There would seem to be no question but that an appellate court may, upon a second appeal, correct the entry of the former judgment, so as to make it express the true decision of the case."

2 *R. C. L.* 226; par. 188 and cases cited.

"The rule known as the law of the case, while conclusive, like a former adjudication as to all matters within its scope, cannot be invoked except on questions which have actually been considered and determined in the first appeal. The rule \* \* \* is not to be extended beyond the exigencies which demand its application."

2 *R. C. L.*, par. 192.

Clerical misprisions in the decree may be corrected where the record furnishes the means of correction.

*Bramlet v. Picket*, (Ky.) 12th Am. Dec. 350  
and note.

So a mistake in the amount of a judgment.

*Latta v. Griffith*, 57 Ind. 329;

*Long v. Gaines*, 4 Bush 353.

Interest has been allowed after mandate and held not to be error although interest was not mentioned in the appellate court.

*Gaines v. Rugg*, 148 U. S. 228;

*Kneeland v. Am. L. & T. Co.*, 138 U. S. 509;  
11 S. Ct. 426.

The lower court is left free to make an order or direction in the further progress of the case not

inconsistent with the decision of the appellate court as to any question not presented or settled by such decision.

*Cunningham v. Ashley*, 16 Ark. 181; 63 Am. Dec. 62.

In the case of *Moore v. Huntington*, 17 Wall. 417, it was said:

“The basis of the account being entirely erroneous \* \* \* and considering the loose and unsatisfactory character of the whole report \* \* \* it is utterly insufficient as a foundation for any decree. Nor can we undertake, with no other report, to render one with which we would be satisfied.”

We regret that the appellate court did not follow this rule on the former appeal.

In the case last above cited it was also said:

“A cross-bill was filed by defendants, which was answered. No notice of this was taken in the final decree, which should have been, though the court undoubtedly supposed it was disposing of the whole case. On the return of the case this may be corrected.”

This forcibly applies to the cross-bill of Stanley and Sallo in the present case, although the court in its findings expressly stated that the sum of \$2400.00 was due said Stanley and Sallo (Tr. 106). “No notice of this was taken in the final decree, which should have been done”.

Authorities justifying the correction of the errors of the court in the case at bar could be multiplied indefinitely; but we consider that this court in the

case of *In re Marks*, 136 Fed., *ante*, is decisive of the rule to be followed in this case, and it is to be observed that:

“The courts of today are assuming a more liberal attitude in the matter of correcting mistakes than obtained formerly.”

The law of *fiat justitia* is superior to that of the law of the case.

*Missouri etc. R. Co. v. Merrill* (Kan.), 59  
L. R. A. 711

“Where an erroneous decision has been rendered in the former appeal, the doctrine of *stare decisis* will not prevent the court from correcting the error, especially when it can be done before the litigation in which the error has been committed has terminated finally.”

15 *R. C. L.*, 960, par. 435.

Rule No. 32 of this court, as well as the mandate, contemplates that further proceedings may be had in the trial court “As to law and justice may appertain”.

The appellate court on the former appeal in directing that finding No. 11 be changed to conform to the opinion of the Circuit Court of Appeals and that the decree be modified accordingly, necessarily directed the correction of other findings *inconsistent* with said finding No. 11 as amended.

We do not contend that by the appeal this case is again opened, on the evidence, but that it does require here, as it should have received in the trial court, an examination and correction of inconsistent

findings and a construction of the mandate different from that of the trial court.

Since reviewing the decisions of the courts in this case we are constrained to agree with Chief Justice Marshall when he said in the case of *Dubourg de St. Columb v. U. S.*, 7 Pet. 625:

“We are of the opinion that a complex and intricate account is an unfit subject for examination in court and ought always to be referred to a commissioner to be examined by him and reported in order to a final decree.”

And in relation to taking partnership accounts, the rule is correctly laid down in *Lindley on Partnership*, pars. 970, 973 and 975, and should have been followed.

An examination of the findings in this case will show that the method of accounting by the trial court was so unique and so simple as to *create suspicion*. The record showed many different items that would necessarily enter into the account, besides the debt due from the partnership to Robinson-Magids & Co. Yet the trial court found that this debt was *to a cent* equal to the difference between the total expenses of the partnership for the years 1910 and 1911, \$35,231.45, and the total output for said year, \$26,138.30, or \$9093.15 plus the net profits of 1910, \$7391.67, which equals \$16,484.82, the debt due Robinson-Magids & Co. without interest. The court found an equally short method to establish the amount due from each partner to the partnership. This was done by dividing the Robinson-Magids & Co. account into four parts, charg-



ing each of the partners with one-quarter thereof, giving defendants credit for \$2153.48 and *charging plaintiff with the balance*. This result followed an erroneous theory or basis for accounting and also errors in computation.

The appellate court, in adjusting the account upon a new basis accepted, and built upon, the erroneous computation of the trial court in the matter of subtracting the credits above mentioned, and failed to supply items necessarily to be taken into account on the new theory, as shown above.

Then, there were the defendants Stanley and Sallo who, by the findings of the trial court were entitled to a credit of \$2400.00 (Tr. 106) for assessment work but who recovered nothing by the decree.

Again there was an item of \$1158.53 due Frank Lesamis (Transcript 128 of former appeal) left out of the account.

These items were all within the material issues of the pleadings and should have been reckoned with in the decree.

The rights of the parties to the action as between themselves were not adjudicated and no mandatory order was made with reference to same. A sale and distribution of the partnership assets, omitting, however, the Moran indebtedness of \$720.00 admitted by plaintiff to be due to the partnership (Tr. 32) was the only mandatory part of the decree, and, when it is considered that the partnership debt was one *in solido*, the division of the debts of the firm between the partners became immaterial, in that



the proceeds of the partnership assets would only reduce the partnership debt *in solido*. Besides, the trial court as well as the United States Marshal treated the *plaintiff* as a *judgment creditor* and permitted him at the execution sale to bid in the partnership property in his own name, "without money and without price". The amount bid was never paid or offered to be paid but the sale on execution was permitted to stand and no reduction of the partnership debt seems ever to have been made. Nor is there any remedy whereby the amounts found due from the partners to the firm or from one partner to the other beyond partnership property can be enforced without an amendment of the decree. Separate actions must be brought by creditors and by the individual partners, one against the other, as their interests may appear, and when this is attempted plaintiffs will undoubtedly be met with the defense of *res judicata*.

In 1 R. C. L., page 225, par. 27, it is said:

"A bill in such a suit imparts an offer on the part of the claimant to pay any balance that may be found against him \* \* \* It is not necessary for defendant to file a cross-bill. Both parties are actors. Defendants are entitled to an *affirmative decree* in their favor if the accounting should justify it."

The defendants Stanley and Sallo, however, did file a *cross-bill*, and a finding was made in their favor, but *not* the decree—it remained silent as to them.

We contend that the decree on its face shows that a further accounting was contemplated and the same should have been had after mandate.

There is another feature of this case. The plaintiff was admittedly a partner in the creditor as well as in the debtor firm. The former could not sue the latter at law, but, in proceedings to account might recover the debt of the insolvent firm and the interest of the common partner in the solvent firm (the plaintiff's credit in one firm offset by his debit in the other).

*Story's Equity*, par. 680;

*Hays v. Bennett*, 3rd Sanford 394.

For the purpose of avoiding such contingency, and for the purpose of enabling the creditor firm to collect at law, the account of the former was assigned to Phillip Murphy, plaintiff's agent, without consideration. Murphy could undoubtedly sue if the assignment was "actual and real".

*Buchanan v. Liebe* (Or.), 5 Pac. 273.

But Murphy testified (Tr. 229, former appeal): "I have no personal interest in this law suit." And the plaintiff testified (Tr. 196, former appeal): "I am liable to my partner personally for the indebtedness of the Klery Creek Mining Co. It was all charged up to me personally." Yet, the whole burden of the decree was to prefer the said Robinson-Magids & Co. as a creditor of the partnership. Their claim was made the basis of all accounting and the end of all liability.

In the matter of the failure of the trial court to set aside the sale on execution for want of the payment of the bid, we think such proceedings were contemplated by the opinion of this court, when it said:

“As sales of assets are made, of course the partners will share equally in the proceeds, and be entitled to have the same applied in that proportion to their indebtedness to the firm, and the adjustment in the end will be on the basis of an equal division of the partnership property.”

This could not be done when bids are not paid. Besides, the plaintiff, who no longer accounts to his partners for what his share of the partnership property brings (and which he did not pay for) gets more than an “equal division”.

The further accounting as to proceeds of sales, at least, should have been allowed.

This is a suit in equity. “He who seeks equity must do equity.” Let us see how this was accomplished by the decree:

Plaintiff, a common partner in both the creditor and the debtor firm, recovers, as partner in one firm, his share of \$19,314.94, though his liability to the other, the debtor firm, was *more than one-half of this amount*, and without the necessity of paying anything out. He does this, without having paid his share of the capital stock (the mining claims) of the debtor partnership; without advancing his share of the costs of the mining operations; without refunding to the partnership the amount

of the net profits withdrawn by him; and without paying his bid on the execution sale of the partnership property, he acquires title to the latter, so that, in the end, the plaintiff, instead of paying \$30,000 for only a quarter interest therein, as he agreed to do, gets all the property for a bagatelle, and lets the defendants, the original owners, *who have paid all the expenses of the mining operations, so far as paid*, "hold the sack", without any recourse against the plaintiff for contribution, or for moneys due them on individual account. His firm, Robinson-Magids & Company, not parties to the suit, were in effect made judgment creditors; while Stanley and Sallo, parties to the action, must content themselves with a mere finding, not a decree, as to the amount due them. And the creditor, Frank Lesamis (by plaintiff's own admission, Tr. 128, former appeal) is entirely left out in the cold.

After appeal, the case came back without mandatory orders, and is again before this court "so that such further proceedings may be had as to law and justice may appertain".

Respectfully submitted,

O. D. COCHRAN,

G. J. LOMEN,

*Attorneys for Appellants.*





United States  
//  
Circuit Court of Appeals  
For the Ninth Circuit.

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FIREMAN'S FUND INSURANCE COMPANY,  
a Corporation,

Plaintiff in Error,

vs.

TROJAN POWDER COMPANY, a Corporation,  
Defendant in Error.

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Transcript of Record.

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Upon Writ of Error to the Southern Division of the  
United States District Court of the  
Northern District of California,  
Second Division.

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Filed

SEP 11 1907

F. D. Monckton,  
Clerk.



**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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**FIREMAN'S FUND INSURANCE COMPANY,**  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*In the District Court of the United States in and for  
the Northern District of California, Division  
Two.*

(No. 15,660.)

TROJAN POWDER COMPANY, a Corporation,  
Plaintiff,

vs.

FIREMAN'S FUND INSURANCE COMPANY, a  
Corporation,

Defendant.

### **Complaint.**

The Trojan Powder Company, a Corporation, complaining of the Fireman's Fund Insurance Company, a Corporation, for cause of action, alleges:

#### **I.**

That at all the times hereinafter mentioned the said Trojan Powder Company, plaintiff above named, was, and still is, a corporation, organized and existing under and by virtue of the laws of the State of New York, having its principal place of business at the City of New York, in said State, and at all of said times was, and still is, a citizen of said State of New York.

#### **II.**

That at all the times hereinafter mentioned the Fireman's Fund Insurance Company was, and still is, a corporation, organized and existing under and by virtue of the laws of the State of California, having its principal place of business at the City and County of San Francisco, in said State, and at all of said

times was, and still is, a citizen of said State of California.

### III.

That heretofore, to wit, on the 7th day of August, 1912, the said Fireman's Fund Insurance Company did make, issue and [1\*] deliver unto the said Trojan Powder Company, its certain policy of marine insurance, wherein and whereby the said Fireman's Fund Insurance Company did insure the said Trojan Powder Company in the sum of Thirty-five Thousand (35,000) Dollars on six thousand (6,000) cases of high explosives laden on board the ship or vessel called the "Pleiades," for a voyage from the port of San Francisco to the port of Balboa, Isthmus of Panama.

### IV.

That it was provided in the said policy that the adventures and perils which the said Company is content to bear and does take upon itself in the said voyage so insured as aforesaid, were, among other things, perils of the sea, and all other perils, losses and misfortunes which have or shall come to the hurt, detriment or damage of the aforesaid subject-matter of this insurance, or any part thereof.

That it was further in and by said policy provided that said goods were warranted free from average unless general or the ship or craft be stranded, sunk or burnt, each craft or lighter being deemed a separate insurance. Underwriters notwithstanding this warranty to pay for any special charges for ware-

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\*Page-number appearing at foot of page of original certified Transcript of Record.



house rent, reshipping or forwarding for which they would otherwise be liable.

## V.

That the said steamer "Pleiades" departed on her voyage in said policy mentioned with said six thousand (6,000) cases of high explosives on board thereof, and while on said voyage said vessel was on the 16th day of August, 1912, stranded off the coast of Mexico, and then and there, together with her cargo, was in danger of becoming a total loss. That thereafter such salvage operations were undertaken as resulted in the floating and saving of said vessel and her cargo, but the said vessel was then and there in such damaged condition that she was unable to proceed upon her said [2] voyage, but was brought back to the port of San Francisco for repairs, where the said cargo was discharged into lighters.

## VI.

That the said plaintiff had prepaid the freight for the carriage of said cargo from the port of San Francisco to the port of Balboa in the sum of Four Thousand Nine Hundred and Fifty (4,950) Dollars, and that in said contract of carriage it was, among other things, provided that said freight was to be considered as earned, vessel or goods lost or not lost at any stage of the entire transit; that on the happening of any of the contingencies in said contract of carriage mentioned, carriers were to have the right to forward the said cargo to the port of destination on their own routes, and should receive extra compensation for said services whether performed by their own vessels or those of strangers.

That among the contingencies so provided in said bill of lading were stranding, straining and any accidents or perils of the seas.

## VII.

That the said cargo was reshipped and forwarded on the steamer "Mackinaw," belonging to said carrier, and transported therein from the port of San Francisco to the port of Balboa, for which service the said plaintiff was then and there compelled to and did pay additional freight in the sum of \$4,050.00.

## VIII.

That the said plaintiff demanded payment of the said insurance company of the said sum so paid to forward said cargo to said port of destination, but said defendant has refused to pay the same, or any part thereof, and no part thereof has been paid; [3]  
AND FOR A FURTHER AND SECOND CAUSE  
OF ACTION AGAINST SAID DEFENDANT,  
SAID PLAINTIFF ALLEGES:

## I.

That at all the times hereinafter mentioned the said Trojan Powder Company, plaintiff above named, was, and still is, a corporation, organized and existing under and by virtue of the laws of the State of New York, having its principal place of business at the City of New York, in said State, and at all of said times was, and still is, a citizen of said State of New York.

## II.

That at all the times hereinafter mentioned the Fireman's Fund Insurance Company, defendant above named, was, and still is, a corporation organ-

ized and existing under and by virtue of the laws of the State of California, having its principal place of business at the City and County of San Francisco, in said State, and at all of said times was, and still is, a citizen of the State of California.

### III.

That heretofore, to wit, on the 7th day of August, 1912, the said Fireman's Fund Insurance Company did make, issue and deliver unto the said Trojan Powder Company its certain policy of marine insurance, wherein and whereby the said Fireman's Fund Insurance Company did insure the said Trojan Powder Company in the sum of Thirty-five Thousand (35,000) Dollars, on six thousand (6,000) cases of high explosives laden on board the ship or vessel called the "Pleiades," for a voyage from the Bay of San Francisco, in the State of California, to the port of Balboa, Isthmus of Panama.

### IV.

That it was provided in said policy that the adventures and perils which the said Company is content to bear and does take upon [4] itself in the voyage so insured as aforesaid, were, among other things, perils of the seas, and all other perils, losses and misfortunes that have or shall come to the hurt, detriment or damage of the subject-matter of this insurance, or any part thereof.

That it was further in and by said policy provided that said goods were warranted free from average unless general, or the ship or craft be stranded, sunk or burnt, each craft or lighter being deemed a separate insurance. Underwriters notwithstanding this.

warranty to pay for any special charges for warehouse rent, reshipping or forwarding for which they would otherwise be liable.

That it was among other things in said policy provided that all questions of liability arising under its policy are to be governed by the laws and customs of England.

#### V.

That it is the law of England that if by reason of damage done to the ship, she cannot be repaired without very great loss of time, the master is at liberty to procure another ship to transport the cargo to the place of destination; that there is and can be no absolute obligation on the part of the master towards the owner of the goods to forward them in the original vessel.

#### VI.

That it is the law of England that where freight is paid in advance, and the contract of carriage provides that it is to be considered as earned, vessel or goods lost or not lost at any stage of the entire transit, such freight is earned by the shipowner when the cargo is received on board; and the right of the shipowner thereto does not depend on the delivery of the cargo at the port of destination.

#### VII.

It is further the law of England that, in a case of marine insurance on merchandise, when, in consequence of a peril insured [5] against, an extra freight must be paid by the cargo owner to bring the said merchandise to the port of destination, such expense is a loss directly due to such peril insured



against for which the insurer is liable.

### VIII.

That the said steamer "Pleiades" departed on her voyage in said policy mentioned, with said six thousand (6,000) cases of high explosives on board thereof, and while on said voyage was on the 16th day of August, 1912, stranded off the coast of Mexico, and then and there, together with her cargo, was in danger of becoming a total loss. That thereafter such salvage operations were undertaken as resulted in the floating and saving of said vessel and her cargo, but the said vessel was then and there in such damaged condition that she was unable to proceed upon her said voyage, but was brought back to the port of San Francisco for repairs, where the said cargo was discharged into lighters. That the repairs on said steamer were not completed until——. That the nature of said goods and the purpose for which said goods were intended, would have rendered it unreasonable to detain them until the completion of said repairs.

### IX.

That said cargo was being transported in said steamer "Pleiades" under a contract of carriage with the California-Atlantic Steamship Company, wherein and whereby it is provided that said freight, whether prepaid or to be collected, was to be considered as earned, vessel or goods lost or not lost at any stage of the entire transit; that on the happening of any of the contingencies in said contract of carriage mentioned, carriers were to have the right to forward the said cargo to the port of destination on their own



routes, and should receive extra compensation for said service, whether performed by their own vessels, or those of strangers. [6]

That among the contingencies so provided in said bill of lading, were stranding, straining and any accidents or perils of the seas.

That the said plaintiff had prepaid the freight for the carriage of said cargo from the port of San Francisco to the port of Balboa, in the sum of Four Thousand Nine Hundred and Fifty (4,950) Dollars.

X.

That the said cargo was on the 15th day of October, 1912, reshipped and forwarded on the steamer "Mackinaw," belonging to said California-Atlantic Steamship Company, and transported therein from the port of San Francisco to the port of Balboa, for which service the said plaintiff was then and there compelled to, and did pay additional freight in the sum of \$4,050.00.

XI.

That said plaintiff has demanded payment of the said Insurance Company of the said sum so paid to forward said cargo to said port of destination, but the said defendant has refused to pay the same, or any part thereof, and no part thereof has been paid.

AND FOR A FURTHER, AND THIRD CAUSE,  
OF ACTION AGAINST SAID DEFENDANT,  
SAID PLAINTIFF ALLEGES:

I.

That at all the times hereinafter mentioned the Trojan Powder Company, plaintiff above named, was, and still is, a corporation, organized and exist-

ing under and by virtue of the laws of the State of New York, having its principal place of business in the City of New York, in said State, and at all of said times was, and still is, a citizen of said State of New York.

II.

That at all the times hereinafter mentioned the Fireman's Fund [7] Insurance Company was, and still is, a corporation, organized and existing under and by virtue of the laws of the State of California having its principal place of business at the City and County of San Francisco, in said State, and at all of said times was, and still is, a citizen of said State of California.

III.

That heretofore, to wit, on the 7th day of August, 1912, the said Fireman's Fund Insurance Company did make, issue and deliver unto the said Trojan Powder Company its certain policy of marine insurance wherein and whereby the said Fireman's Fund Insurance did insure the said Trojan Powder Company in the sum of Thirty-five Thousand (35,000) Dollars, on six thousand cases of high explosives laden on board the ship or vessel called the "Pleiades," for a voyage from the Bay of San Francisco to the port of Balboa, Isthmus of Panama.

IV.

That it was provided in said policy that the adventures and perils which the said company is content to bear and does take upon itself in the voyage so insured as aforesaid, were, among other things, perils of the seas, and all other perils, losses and misfor-

tunes which have or shall come to the hurt, detriment or damage of the subject-matter of this insurance, or any part thereof.

That it was, among other things, in said policy provided that all questions of liability arising under its policy are to be governed by the laws and customs of England.

#### V.

That the said steamer "Pleiades" departed on her voyage in said policy mentioned with six thousand (6,000) cases of high explosives on board thereof, and while on said voyage was on the 16th day of August, 1912, stranded off the coast of Mexico, and [8] *and* then and there together with her cargo was in danger of becoming a total loss. That thereafter such salvage operations were undertaken as resulted in the floating and saving of said vessel and her cargo, but the said vessel was then and there in such damaged condition that she was unable to proceed upon her said voyage, but was brought back to the port of San Francisco for repairs, where the said cargo was discharged into lighters. That the repairs on said steamer were not completed until ———. That the nature of said goods and purpose for which said goods were intended, would have rendered it unreasonable to detain them until the completion of said repairs.

#### VI.

That said cargo was being transported in said steamer "Pleiades" under a contract of carriage with the California-Atlantic Steamship Company, wherein and whereby it was provided that freight, whether

prepaid or to be collected, was to be considered as earned, vessel or goods lost or not lost at any stage of the entire transit; that on the happening of any of the contingencies in said contract of carriage mentioned, said carriers were to have the right to forward said cargo to the port of destination on their own routes, and should receive extra compensation for said service, whether performed by their own vessels or those of strangers.

That among the contingencies so provided in said bill of lading, was stranding, straining and any accidents or perils of the seas.

That the said plaintiff had prepaid the freight for the carriage of said cargo from the port of San Francisco to Balboa in the sum of Four Thousand Nine Hundred and Fifty (4,950) Dollars.

#### VII.

That the said cargo was on the 15th day of October, 1912, reshipped and forwarded on the steamer "Mackinaw" belonging to said [9] California-Atlantic Steamship Company, and transported therein from the port of San Francisco to the port of Balboa, for which service the said plaintiff was then and there compelled to and did pay additional freight in the sum of \$4,050.00.

#### VIII.

That under a policy and contract of carriage such as that hereinbefore set forth, and under such facts as those hereinbefore set forth, it is the practice and custom of Underwriters in England to pay the excess of the expense to which the owner of the goods is put in bringing them to their destination over the freight



originally paid, as a loss directly due to said peril.

IX.

That said plaintiff has demanded payment of the said Insurance Company of the said sum so paid to forward said cargo to said port of destination, but said defendant has refused to pay the same, or any part thereof, and no part thereof has been paid.

AND FOR A FURTHER AND FOURTH CAUSE  
OF ACTION AGAINST SAID DEFENDANT,  
SAID PLAINTIFF ALLEGES:

I.

That at all the times hereinafter mentioned the said Trojan Powder Company was, and still is, a corporation, organized and existing under and by virtue of the laws of the State of New York, having its principal place of business at the City of New York, in said State, and at all of said times was, and still is, a citizen of said State of New York.

II.

That at all the times hereinafter mentioned, the Fireman's Fund Insurance Company, defendant named, was, and still is, a corporation, organized and existing under and by virtue of the laws of the State of California, having its principal place of business [10] at the City and County of San Francisco, in said State, and at all of said times was, and still is, a citizen of said State of California.

III.

That heretofore, to wit, on the 7th day of August, 1912, the said Fireman's Fund Insurance Company did make, issue and deliver unto the said Trojan Powder Company its certain policy of marine insur-



ance, wherein and whereby the said Fireman's Fund Insurance Company did insure the said Trojan Powder Company in the sum of Thirty-five Thousand (35,000) Dollars on six thousand (6,000) cases of high explosives laden on board the ship or vessel called the "Pleiades," for a voyage from the Bay of San Francisco to the port of Balboa, Isthmus of Panama.

## IV.

That it was provided in said policy that the adventures and perils which the said Company is content to bear and does take upon itself in the voyage so insured as aforesaid were, among other *other* things, perils of the seas, and all other perils, losses and misfortunes which have or shall come to the hurt, detriment or damage of the subject matter of this insurance, or any part thereof.

That it was among other things in said policy provided that in case of loss or misfortune it shall be lawful to the insured, their factors, servants and assigns, to sue, labor and travel for, in and about the defense, safeguard and recovery of the aforesaid subject matter of this insurance, or any part thereof, without prejudice to this insurance, the charges whereof the said Company will bear in proportion to the sum hereby insured. That said goods were insured up to their full value.

## V.

That the said steamer "Pleiades" departed on her said voyage [11] in said policy mentioned, with said six thousand (6,000) cases of high explosives on board thereof, and while on said voyage was on

the 16th day of August, 1912, stranded off the coast of Mexico and then and there, together with her cargo, was in danger of becoming a total loss. That thereafter such salvage operations were undertaken as resulted in the floating and saving of said vessel and her cargo, but the said vessel was then and there in such damaged condition that she was unable to proceed upon her said voyage, but was brought back to the port of San Francisco for repairs, where the said cargo was discharged into lighters. That the repairs on said steamer were not completed until ———. That said goods were then and there in danger of loss and deterioration, if detained at the port of repair.

## VI.

That in order to transport the said cargo to its port of destination, the said plaintiff was compelled to and did ship the same on the steamer "Mackinaw" from the port of San Francisco to the port of Balboa, and the said plaintiff was then and there compelled to and did pay the sum of Four Thousand and Fifty (4,050) Dollars additional freight for the carriage aforesaid.

## VII.

That said cargo was being transported in said steamer "Pleiades" under a contract of carriage with the California-Atlantic Steamship Company, wherein and whereby it was provided that freight, whether prepaid or to be collected, was to be considered as earned vessel or goods lost or not lost at any stage of the entire transit; that on the happening of any of the contingencies in said contract of

carriage mentioned, said carriers were to have the right to forward said cargo to the port of destination on their own routes, and should receive extra compensation for said service, whether performed by their own vessels, or those of strangers. [12]

That among the contingencies so provided in said bill of lading was stranding, straining and any accidents or perils of the seas.

That the said plaintiff had prepared the freight for the carriage of said cargo from the port of San Francisco to the port of Balboa, in the sum of Four Thousand Nine Hundred and Fifty (4,950) Dollars.

VIII.

That the said plaintiff demanded payment of the said Insurance Company of the said sum so paid to forward said cargo to said port of destination, but said defendant has refused to pay the same, or any part thereof, and no part thereof has been paid.

WHEREFORE, plaintiff prays for judgment against said defendant in the sum of Four Thousand and Fifty (4,050) Dollars, together with interest from the 15th day of October, 1912, and costs of suit.

NATHAN H. FRANK,  
IRVING H. FRANK,  
Attorneys for Plaintiff.

State of California,

City and County of San Francisco,—ss.

W. P. Mulhern being duly sworn, deposes and says: That he is an officer of Trojan Powder Company, a corporation, plaintiff in the above-entitled cause, to wit, the Manager thereof; that he has read the foregoing Complaint, and knows the contents

16      *Fireman's Fund Insurance Company*

thereof; that the same is true of his own knowledge, except as to the matters which are therein stated upon information and belief, and that as to those matters he believes it to be true.

W. P. MULHERN.

Subscribed and sworn to before me this 27th day of May, 1913.

[Seal]

CHARLES EDELMAN,  
Notary Public in and for the City and County of  
San Francisco, State of California.

My commission expires April 9th, 1914. [13]

[Endorsed]: Filed May 27, 1913. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [14]

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*In the District Court of the United States in and for  
the Northern District of California, Second  
Division.*

No. 15,660.

TROJAN POWDER COMPANY, a Corporation,  
Plaintiff,

vs.

FIREMAN'S FUND INSURANCE COMPANY,  
a Corporation,

Defendant.

**Answer.**

Comes now the Fireman's Fund Insurance Company, a corporation, and in answer to the allegations of the first cause of action in the complaint herein admits, denies and alleges, as follows:



I.

Defendant admits the allegations of paragraph I of said first cause of action.

II.

Defendant admits the allegations of paragraph II of said first cause of action.

III.

Defendant admits the allegations of paragraph III of said first cause of action.

IV.

Defendant admits the allegations of paragraph IV of said first cause of action.

V.

Defendant admits the allegations of paragraph V of said first cause of action. [15]

VI.

Answering unto the allegations of paragraph VI of said first cause of action, defendant alleges that it has no information or belief as to the same sufficient to enable it to answer said allegations, and placing its denial on that ground, denies that said plaintiff had prepaid the freight for the carriage of said cargo from the port of San Francisco to the port of Balboa in the sum of \$4,950, or in any sum whatsoever, or at all, and that in said contract of carriage it was, among other things, or at all, provided that said freight was to be considered as earned, vessel or goods lost, or not lost, at any stage of the entire transit, and denies that the said plaintiff had prepared the freight for the carriage of said cargo from the port of San Francisco to the port of Balboa in the sum of \$4,950, or in any sum whatsoever, or at all,



or that in the said contract of carriage it was, among other things, or at all, provided that the said freight was to be considered as earned, vessel or goods lost, or not lost, at any stage of the entire transit. Defendant, on the same ground, further denies that on the happening of any of the contingencies in said contract mentioned, or on any other contingency, or at all, in said contract of carriage, the carriers were to have the right to forward the said cargo to the port of destination on their own routes, and should receive such extra compensation for said service, whether performed by their own vessels, or those of strangers, and denies that on the happening of any of the contingencies in said contract mentioned, or on any other contingency, or at all, carriers were to have the right to forward the said cargo to the port of destination on their own routes, or should receive extra compensation for said service, whether performed by their own vessels or those [16] of strangers. Defendant, on the same ground, further denies that, among the contingencies so provided in said contract were stranding or straining or any of the accidents or perils of the sea, or stranding or straining or any of the accidents or perils of the seas.

## VII.

Answering unto the allegations of paragraph VII of said first cause of action, defendant admits that it is informed that said cargo was reshipped and forwarded on the steamer "Mackinaw," belonging to said carrier, and transported therein from the port of San Francisco to the port of Balboa. Defendant alleges that it has no information or belief as to that

portion of said paragraph alleging

“for which service the plaintiff was then and there compelled to, and did, pay additional freight in the sum of \$4050,”

and placing its denial on that ground, denies that said plaintiff was then and there, or then or there, compelled to, and did, pay additional freight in the sum of \$4,050, or in any sum whatsoever, or at all, for said transportation of said cargo from the port of San Francisco to the port of Balboa; and denies that said plaintiff was then and there, or then or there, compelled to, or did, pay additional freight in the sum of \$4,050, or in any sum whatsoever, or at all, for said service.

### VIII.

Answering unto the allegations of paragraph VIII of said first cause of action, defendant alleges that it has no information or belief as to whether said sum of \$4,050 was paid to forward said cargo to the port of destination, and placing its denial on that ground, denies that said sum of \$4,050 was paid to forward said cargo to destination; it admits, however, that plaintiff demanded payment [17] of defendant of the said sum so alleged to have been paid to forward said cargo to said port of destination, and that defendant has refused to pay the same, or any part thereof, and that no part of same has been paid.

In answer to the allegations contained in the second cause of action in the complaint herein, defendant admits, denies and alleges, as follows:

#### I.

Defendant admits the allegations of paragraph I

of said second cause of action.

II.

Defendant admits the allegations of paragraph II of said second cause of action.

III.

Defendant admits the allegations of paragraph III of said second cause of action.

IV.

Defendant admits the allegations of paragraph IV of said second cause of action.

V.

Answering unto the allegations of paragraph V of said second cause of action, defendant admits that it is the law of England that if by reason of damage done to a ship she cannot be repaired without a very great loss of time, the master is at liberty to procure another ship to transport the cargo to the place of destination. Defendant denies that there is, and can be, no absolute obligation on the part of the master toward the owner of the goods to forward them in the original vessel, and denies that there is, or can be, no absolute obligation on the part of the master toward the owner of the goods to forward them in [18] the original vessel.

VI.

Answering unto the allegations of paragraph VI of said second cause of action, defendant denies that it is the law of England that where freight is paid in advance and the contract of carriage provided, or the contract of carriage provided, that it is to be considered as earned, vessel or goods lost or not lost at any stage of the entire transit, such freight is

earned by the ship-owner when the cargo is received on board, and that the right of the shipowner thereto, or that the right of the shipowner thereto, does not depend on the delivery of the cargo at the port of destination. Defendant admits, however, that the right of the shipowner to prepaid freight does not depend on the delivery of the cargo at the port of destination. And in that behalf alleges that the payment of freight in advance does not relieve the shipowner from his obligation of exercising due diligence to carry the cargo so paid for forward to destination, and that freight paid in advance is not earned if the vessel or goods be lost by any negligence for which the shipowner is responsible.

#### VII.

Answering unto the allegations of paragraph VII of said second cause of action, defendant denies that it is further, or at all, the law of England that in case of marine insurance on merchandise when in consequence of a peril insured against, an extra, or any, freight must be paid by the cargo owner to bring said merchandise to the port of destination, such expense is a loss directly, or otherwise, or at all, due to such peril insured against for which the insurer is liable.

#### VIII.

Answering unto the allegations of paragraph VIII of [19] said second cause of action, defendant admits that said steamer "Pleiades" departed on her voyage in the said policy mentioned with said 6,000 cases of high explosives on board, and while on said voyage was, on the 16th day of August, 1912, stranded off the coast of Mexico, and then and there,



together with her cargo, was in danger of becoming a total loss; that thereafter, such salvage operations were undertaken as resulted in the floating and saving of said vessel, and her cargo, but that the said vessel was then and there in such damaged condition that she was unable to proceed upon her said voyage, but was brought back to the port of San Francisco for repairs, where said cargo was discharged into lighters. Defendant admits that the repairs on said vessel were not completed until ———. Defendant denies that the nature of said goods, and the purpose for which said goods were intended would have rendered it unreasonable to have detained them until completion of said repairs, and denies that the nature of said goods, or the purpose for which said goods were intended, or any other reason whatsoever, would have rendered it unreasonable to detain them until the completion of said repairs.

### IX.

Answering unto the allegations of paragraph IX of said second cause of action, defendant alleges that it has no information or belief as to the allegations contained in said paragraph IX, and placing its denial on that ground, denies that said cargo was being transported in said steamer "Pleiades" under a contract of carriage with the California-Atlantic Steamship Company wherein and whereby, or wherein or whereby, it is provided that said freight, whether prepaid or to be collected, was to be considered as earned, vessel or goods lost or not lost at any stage of the entire transit; and on the same ground denies that such cargo was to be transported [20]



in said steamer "Pleiades" under a contract of carriage with the California-Atlantic Steamship Company providing that on the happening of any of the contingencies in said contract of carriage mentioned, or for any other reason, or at all, carriers were to have the right to forward the said cargo to the port of destination on their own routes, and should receive extra compensation for such service, whether performed by their own vessels or those of strangers, or for any other reason, or at all; and denies that on the happening of any of the contingencies in said contract of carriage mentioned, or for any other reason, or at all, carriers were to have the right to forward the said cargo to the port of destination on their own routes, or should receive extra compensation for said service, whether performed by their own vessels or those of strangers, or for any other reason or at all.

Defendant, on the same ground, further denies that among the contingencies so provided in said bill of lading were stranding, straining or any accidents or perils of the seas, or stranding or straining or any accidents or perils of the seas.

Defendant, on the same ground, further denies that the said plaintiff had prepaid the freight for the carriage of such cargo from the port of San Francisco to the port of Balboa in the sum of \$4,950, or in any sum whatsoever, or at all.

X.

Answering unto the allegations of paragraph X of said second cause of action, defendant admits that it is informed that said cargo was, on the 15th day

of October, 1912, reshipped and forwarded on the steamer "Mackinaw," belonging to said California-Atlantic Steamship Company, and transported therein from the port of San Francisco to the port of Balboa. Defendant alleges that it has no information or belief as to that portion of said paragraph alleging [21]

"for which service the said plaintiff was then and there compelled to, and did, pay additional freight in the sum of \$4050,"

and placing its denial on that ground, denies that said plaintiff was then and there compelled to, and did, pay additional freight in the sum of \$4,050, or in any sum whatsoever, or at all, for said transportation of said cargo from the port of San Francisco to the port of Balboa, and denies that said plaintiff was then and there, or then or there, compelled to, or did, pay additional freight in the sum of \$4,050, or in any sum whatsoever, or at all, for said service.

## XI.

Answering unto the allegations of paragraph XI of said second cause of action, defendant alleges that it has no information or belief as to whether said sum of \$4,050 was paid to forward said cargo to the port of destination, and placing its denial on that ground, denies that said sum of \$4,050, or any sum, was paid to forward said cargo to destination; it admits, however, that plaintiff demanded payment of defendant of the said sum so alleged to have been paid to forward said cargo to said port of destination, and that defendant has refused to pay the same,

or any part thereof, and that no part of same has been paid.

In answer to the allegations contained in the third cause of action in the complaint herein, defendant admits, denies and alleges, as follows:

I.

Defendant admits the allegations of paragraph I of said third cause of action.

II.

Defendant admits the allegations of paragraph II of said third cause of action. [22]

III.

Defendant admits the allegations of paragraph III of said third cause of action.

IV.

Defendant admits the allegations of paragraph IV of said third cause of action.

V.

Answering unto the allegations of paragraph V of said third cause of action, defendant admits that said steamer "Pleiades" departed on her voyage in the said policy mentioned with said 6,000 cases of high explosives on board, and while on said voyage was, on the 16th day of August, 1912, stranded off the coast of Mexico, and then and there, together with her cargo, was in danger of becoming a total loss; that thereafter such salvage operations were undertaken as resulted in the floating and saving of said vessel, and her cargo, but that the said vessel was then and there in such damaged condition that she was unable to proceed upon her said voyage, but was brought back to the port of San Francisco for repairs, where

said cargo was discharged into lighters. Defendant admits that the repairs on said vessel were not completed until ——. Defendant denies that the nature of the said goods, and the purpose for which said goods were intended would have rendered it unreasonable to have detained them until completion of said repairs, and denies that the nature of said goods, or the purpose for which said goods were intended, or any other reason whatsoever, would have rendered it unreasonable to detain them until the completion of said repairs.

#### VI.

Answering unto the allegations of paragraph VI of said third cause of action, defendant alleges that it has no information or belief as to the allegations contained in said paragraph VI, and [23] placing its denial on that ground, denies that said cargo was being transported in said steamer "Pleiades" under a contract of carriage with the California-Atlantic Steamship Company wherein and whereby, or wherein or whereby, it is provided that said freight, whether prepaid or to be collected, was to be considered as earned, vessel or goods lost or not lost, at any stage of the entire transit; and on the same ground denies that such cargo was to be transported in said steamer "Pleiades" under a contract of carriage with the California-Atlantic Steamship Company providing that on the happening of any of the contingencies in said contract of carriage mentioned, or for any other reason, or at all, said carriers were to have the right to forward said cargo to the port of destination on their own routes, and



should receive extra compensation for such service, whether performed by their own vessels or those of strangers, or for any other reason, or at all; and denies that on the happening of any of the contingencies in said contract of carriage mentioned, or for any other reason, or at all, carriers were to have the right to forward the said cargo to the port of destination on their own routes, or should receive extra compensation for said service, whether performed by their own vessels or those of strangers, or for any other reason, or at all.

Defendant, on the same ground, further denies that among the contingencies so provided in said bill of lading were stranding, straining or any accidents or perils of the seas, or stranding or straining or any accidents or perils of the seas.

Defendant, on the same ground, further denies that the said plaintiff had prepaid the freight for the carriage of such cargo from the port of San Francisco to the port of Balboa in the sum of \$4,950, or in any sum whatsoever, or at all.

## VII.

Answering unto the allegations of paragraph VII of said [24] third cause of action, defendant admits that it is informed that said cargo was, on the 15th day of October, 1912, reshipped and forwarded on the steamer "Mackinaw," belonging to the said California-Atlantic Steamship Company, and transported therein from the port of San Francisco to the port of Balboa. Defendant alleges that it has no information or belief as to that portion of said paragraph alleging



“for which service the said plaintiff was then and there compelled to, and did, pay additional freight in the sum of \$4,050.”

and placing its denial on that ground, denies that said plaintiff was then and there compelled to, and did, pay additional freight in the sum of \$4,050, or in any sum whatsoever, or at all, for said transportation of said cargo from the port of San Francisco to the port of Balboa, and denies that said plaintiff was then and there, or then or there, compelled to, or did, pay additional freight in the sum of \$4,050, or in any sum whatsoever, or at all, for said service.

#### VIII.

Answering unto the allegations of paragraph VIII of said third cause of action, defendant denies that under a policy and contract of carriage, such as that thereinbefore in said second cause of action set forth, and under such facts as those thereinbefore in said second cause of action set forth, and under such facts as those thereinbefore in said second cause of action set forth, it is the practice and custom of underwriters in England to pay the excess of the expense, or any expense, or at all, to which the owner of the goods is put in bringing them to their destination over the freight originally paid, as a loss directly, or indirectly, or at all, due to said peril, or otherwise, or at all; and denies that under a policy or contract of carriage such as that thereinbefore set forth in said second cause of action, or under such facts, as those thereinbefore in said second cause of action set forth, it is the practice and custom, or practice [25] or custom, of underwriters in England to pay

the excess of the expense, or any expense, or at all, to which the owner of the goods is put to bring them to their destination over the freight originally paid, as a loss directly or indirectly, or at all, due to said peril, or otherwise, or at all.

### IX.

Answering unto the allegations of paragraph IX of said third cause of action, defendant alleges that it has no information or belief as to whether said sum of \$4,050 was paid to forward said cargo to the port of destination, and placing its denial on that ground, denies that said sum of \$4,050 was paid to forward said cargo to destination; it admits, however, that plaintiff demanded payment of defendant of the said sum so alleged to have been paid to forward said cargo to said port of destination, and that defendant has refused to pay the same, or any part thereof, and that no part of same has been paid.

In answer to the allegations contained in the fourth cause of action in the complaint herein, defendant admits, denies and alleges, as follows:

#### I.

Defendant admits the allegations of paragraph I of said fourth cause of action.

#### II.

Defendant admits the allegations of paragraph II of said fourth cause of action.

#### III.

Defendant admits the allegations of paragraph III of said fourth cause of action.

#### IV.

Defendant admits the allegations of paragraph

IV of said fourth cause of action. [26]

## V.

Answering unto the allegations of paragraph V of said fourth cause of action, defendant admits that said steamer "Pleiades" departed on her voyage in said policy mentioned with said 6,000 cases of high explosives on board, and while on said voyage was, on the 16th day of August, 1912, stranded off the coast of Mexico, and then and there, together with her cargo, was in danger of becoming a total loss; that thereafter, such salvage operations were undertaken as resulted in the floating and saving of said vessel, and her cargo, but that the said vessel was then and there in such damaged condition that she was unable to proceed upon her said voyage, but was brought back to the port of San Francisco for repairs, where said cargo was discharged into lighters. Defendant admits that the repairs on said vessel were not completed until ———. Defendant denies that said goods were then and there in danger of loss and deterioration if detained at the port of repair, and denies that said goods were then or there in danger of loss and deterioration, or in danger of loss or deterioration if detained at the port of repair, or in danger of any loss of any kind whatsoever, or at any place whatsoever, or at any time whatsoever, or otherwise, or at all.

## VI.

Answering unto the allegations of paragraph VI of said fourth cause of action, defendant denies that in order to transport said cargo to its port of destination that said plaintiff was compelled to, and did,

or was compelled to, or did, ship the same on the steamer "Mackinaw" from the port of San Francisco to the port of Balboa. Defendant alleges that it has no information or belief sufficient to enable it to answer the remaining allegations of said paragraph, and placing its denial upon that ground, [27], denies that plaintiff was then and there, or then or there compelled and did, or did, pay the sum of \$4,050, or any sum whatever, or at all, additional freight for the carriage alleged in said paragraph, and, on the same ground, further denies that in order to transport the said cargo to its port of destination said plaintiff was compelled to, and did, or did, ship the same on the steamer "Mackinaw" from the port of San Francisco to the port of Balboa, and that said plaintiff was then and there, or then or there, compelled to, and did, or did, pay the sum of \$4,050, or any sum whatsoever, or at all, additional freight for the carriage aforesaid, and denies that in order to transport the said cargo to its port of destination that said plaintiff was compelled to, and did, or did, ship the same on the steamer "Mackinaw" from the port of San Francisco to the port of Balboa, or that the said plaintiff was then and there, or then or there, compelled to, and did, pay, or did pay, the sum of \$4,050, or any sum whatsoever, or at all, additional freight for the carriage aforesaid.

## VII.

Answering unto the allegations of paragraph VII of said fourth cause of action, defendant alleges that it has no information or belief as to the allegations contained in said paragraph sufficient to enable it to



answer the same, and placing its denial on that ground, denies that said cargo was being transported in said steamer "Pleiades" under a contract of carriage with the California-Atlantic Steamship Company wherein and whereby, or wherein or whereby, it was provided that freight, whether prepaid or to be collected, was to be considered as earned, vessel or goods lost or not lost, at any stage of the entire transit; and on the same ground denies that such cargo was to be transported in said steamer "Pleiades" under a contract of carriage with the California-Atlantic Steamship Company, providing that on the happening of any [28] of the contingencies in said contract mentioned, or for any other reason, or at all, said carriers were to have the right to forward said cargo to the port of destination on their own routes, but should receive extra compensation for such service, whether performed by their own vessels or those of strangers, or for any other reason, or at all; and denies that on the happening of any of the contingencies in said contract or carriage mentioned, or for any other reason, or at all, said carriers were to have the right to forward the said cargo to the port of destination on their own routes, or should receive extra compensation for such service, whether performed by their own vessels, or those of strangers, or for any other reason, or at all. Defendant, on the same ground, further denies that among the contingencies so provided in said bill of lading were stranding, straining and any accidents or perils of the seas, or stranding or straining or any accidents or



perils of the seas. Defendant, on the same ground, denies that said plaintiff had prepaid the freight for the carriage of said cargo from the port of San Francisco to the port of Balboa in the sum of \$4,050, or in any sum whatsoever, or at all.

### VIII.

Answering unto the allegations of paragraph VIII of said fourth cause of action, defendant alleges that it has no information or belief as to whether said sum of \$4,050 was paid to forward said cargo to the port of destination, and placing its denial on that ground, denies that said sum of \$4,050, or any sum, was paid to forward said cargo to destination; it admits, however, that plaintiff demanded payment of defendant of the said sum so alleged to have been paid to forward said cargo to said port of destination, and that defendant has refused to pay the same, or any part thereof, and that no part of same has been paid. [29]

For a first and further affirmative defense to the complaint herein, and each and every of the causes of action therein set forth, defendant alleges:

### I.

That defendant is, and was during all the times herein mentioned, a corporation duly organized and existing under and by virtue of the laws of the State of California, having its principal place of business in the City and County of San Francisco, said State, and is, and was during all the said times, engaged in the business, *inter alia*, of marine insurance.

## II.

That plaintiff is, and was during all the times herein mentioned, a corporation duly organized and existing under and by virtue of the laws of the State of New York, having its principal place of business in the City of New York, said State.

## III.

That heretofore, on or about the 7th day of August, 1912, defendant issued unto plaintiff its policy of insurance Number 307,264, insuring plaintiff in the sum of Thirty-five Thousand (35,000) Dollars, on six thousand (6,000) cases of high explosives, against, *inter alia*, perils of the seas, on a voyage at and from San Francisco to Balboa, laden on the steamer "Pleiades," a copy of which policy is attached hereto, marked Exhibit "A" and hereby made a part of this answer, with the same force and effect as though the same were pleaded at length herein.

## IV.

That thereafter, on the 16th day of August, 1912, while upon said voyage, said steamer "Pleiades," with said cargo on board, stranded on the coast of Mexico, and was thereafter released, and, with said cargo still on board, in sound condition, [30] returned to the port of San Francisco, where, in due course, she was fully and completely repaired of the damage caused by said stranding, and was thereafter able to complete said voyage and carry said cargo to destination.

## V.

That, under the law of England, it was the obligation of the carrier, in consideration of the original

freight, whether prepaid or not, to complete said voyage with said steamer "Pleiades" upon the completion of the repairs to said steamer necessitated by said stranding, and to transport said cargo to its port of destination without requiring the payment of a second freight therefor.

## VI.

That if said cargo were reshipped and forwarded on said steamer "Mackinaw" to said port of Balboa and said additional freight paid thereon, as alleged in said complaint, said reshipment and said payment of said additional freight were voluntary on the part of said plaintiff without waiting for the completion of the repairs to said steamship and were not caused by any of the perils insured against by said policy, and, by the law of England, did not constitute a loss, or charge, or liability under the terms and conditions of said policy.

For a second and further affirmative defense to the complaint herein, and to each and every of the causes of action therein set forth, defendant alleges:

## I.

Defendant hereby refers to and reiterates the allegations of paragraphs I, II, III, IV and V of said first affirmative defense, and hereby makes the same a part of this second affirmative [31] defense, with the same force and effect as though pleaded at length herein.

## II.

That, under the law of England, if by reason of the specific purpose for which said goods were intended, or of the contract under which said goods

were sold, said goods could not be detained at said port of San Francisco until the completion of the repairs of said steamer, and thence forwarded in said steamer to the port of destination, and if upon reshipment of said goods to destination an additional freight was paid by plaintiff, such extra freight did not constitute a loss, or charge, or liability, under said policy for the reason that it was not caused by any peril insured against by said policy.

For a third and further affirmative defense to the complaint herein, and to each and every of the causes of action therein set forth, defendant alleges:

I.

Defendant hereby refers to and reiterates the allegations of paragraphs I, II, III, IV and V of said first affirmative defense, and hereby makes the same a part of this third affirmative defense, with the same force and effect as though pleaded at length herein.

II.

That, under the law of England, if by reason of their nature, said goods could not be detained at said port of San Francisco until the completion of the repairs of said steamer, and thence transported in said steamer to the port of destination, and if upon reshipment of said goods to destination an additional freight was paid by plaintiff, such extra freight did not constitute a loss, or charge, or liability, under said policy for the reason [32] that the same, or any part thereof, was not in excess of the original freight, and the payment thereof, as an extra freight, was not due to any peril insured against by said pol-



icy, but resulted from the nature of the contract of carriage entered into with the owner or charterer of said steamer "Pleiades" by which said original freight was prepaid, and was to be considered as earned, ship or goods lost or not lost at any stage of the entire transit, against which said policy did not cover.

For a fourth and further affirmative defense to the claimant herein, and to each and every of the causes of action therein set forth, defendant alleges:

I.

Defendant hereby refers to and reiterates the allegations of paragraphs I, II, III, IV and V of said first affirmative defense, and hereby makes the same a part of this fourth affirmative defense, with the same force and effect as though pleaded at length herein.

II.

That, under the law of England, if, by reason of the nature of, or purpose for which, said goods was intended, or by reason of the contract under which said goods were sold, said goods could not be detained at the port of San Francisco until the completion of repairs of said steamer "Pleiades," and hence transported in said steamer to the port of destination, such facts were not disclosed by plaintiff to defendant, and if by reason of said reshipment and payment of extra freight, a charge was incurred, or loss suffered, which was covered by said policy, the failure and neglect of plaintiff to disclose said facts to defendant constituted the concealment of facts



material to the risk, and by reason thereof [33]  
said policy was voided.

WHEREFORE, defendant prays that the complaint herein may be dismissed with costs.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Attorneys for Defendant,

State of California,

City and County of San Francisco,—ss.

J. B. LEVISON, being first duly sworn, deposes and says:

That he is an officer, to wit, the Second Vice-president of the Fireman's Fund Insurance Company, a corporation, defendant in the above-entitled action; that he makes this verification and affidavit on behalf of said corporation; that he had read the foregoing answer and is familiar with the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters, that he believes it to be true.

J. B. LEVISON.

Subscribed and sworn to before me this 1st day of November, 1913.

[Seal]

JAMES MASON,

Notary Public in and for the City and County of San Francisco, State of California. [34]

## DUPLICATE

CARGO—ENGLISH FORM

## FIREMAN'S FUND INSURANCE COMPANY

SAN FRANCISCO, CALIFORNIA

All Policies issued abroad and made payable in the United Kingdom are required by law to have a Government Stamp of one penny per £100 affixed within ten days after date of receipt in the United Kingdom.

No. 307264

£ \$35,000

Warranted free of capture, seizure and detention and the consequences thereof or of any attempt therat piracy excepted and also from all consequences of riots, civil commotions, hostilities or warlike operations, whether before or after declaration of war.

It is hereby agreed that the rights of the assured shall not be prejudiced by the insertion in the bill of lading of the London conference rules of affreightment 1893, or of the following clause:

"The act of God, perils of the sea, fire, barratry of the master and crew, enemies, pirates, thieves, arrest, and restraint of princes, rulers and people, collisions, stranding and other accidents of navigation excepted, even when occasioned by the negligence, default, or error in judgment of the pilot, master mariners, or other servants of the ship-owners."

Warranted free from average unless general or the ship or craft be stranded, sunk or burnt, such craft or lighter being deemed a separate insurance.

Underwriters notwithstanding this warranty to pay for any damage caused by fire or by collision with any other ship or vessel or with ice or with any substance other than water and any special charges for warehouse rent, re-shipping or forwarding for which they would otherwise be liable, also to pay the insured value of any package or packages which may be totally lost in trans-shipment.

AND the said Company promises and agrees that the Insurance aforesaid shall commence upon the said Freight Goods and Merchandise from the time when the Goods and Merchandise shall be laden on board the said Ship or Vessel Craft or Boat as above and continue until the said Goods and Merchandise be discharged and safely landed at as above AND that it shall be lawful for the said Ship or Vessel in the Voyage so insured as aforesaid to proceed and sail to and touch and stay at any Ports or Places whatsoever without prejudice to this Insurance AND touching the Adventures and Perils which the said Company is content to bear and does take upon itself in the Voyage so Insured as aforesaid they are of the Seas Men-of-War Fire Enemies Pirates Rovers Thieves Jetitions Letters of Mart and Counter Mart Surprisals Takings at Sea Arrests Restraints and Detainments of all Kings Princes and People of what Nation Condition or Quality soever Barratry of the Master and Mariners and of all other Perils Losses and Misfortunes that have or shall come to the Hurt Detriment or Damage of the aforesaid subject matter of this Insurance or any part thereof AND in case of any Loss or Misfortune it shall be lawful to the Insured their Factors Servants and Assigns to sue labour and travel for in and about the Defence Saffeguard and Recovery of the aforesaid subject matter of this Insurance or any part thereof without prejudice to this Insurance the charges whereof the said Company will bear in proportion to the sum hereby insured AND (it is expressly declared and agreed that the acts of Insurer or Insured in Recovering Saving or Preserving the Property Insured shall not be considered a waiver or acceptance of abandonment) AND it is declared and agreed that Corn Fish Salt Saltpetre Fruit Flour Rice Seeds Hides Skins and Molasses shall be and are warranted free from average unless general or the Ship be stranded sunk or burnt or unless caused by collision with any other Ship or Vessel and that Sugar Tobacco Hemp and Flax shall be and are warranted free from average under Five Pounds per centum and that all other Goods and also Ship and Freight shall be and are warranted free from average under Three Pounds per centum unless general or the Ship be stranded sunk or burnt.

It is hereby understood and agreed that in case of claim for loss or damage to the interest insured under this policy same shall be reported as soon as goods are landed or loss known to Joseph Hadley Esq. No. 1 Cornhill E. C. London or Messrs. Brodrick Leitch & Kendall No. B 18 Liverpool and London Chambers Liverpool; and that all claims hereunder shall be paid at the office of this Company in San Francisco or at the office of Messrs. Brown Shipley & Company London upon certificate of loss signed by Joseph Hadley Esq. or Messrs. Brodrick Leitch & Kendall.

In Witness Whereof the FIREMAN'S FUND INSURANCE COMPANY has caused these presents to be signed by its duly authorized officers

in the City of SAN FRANCISCO, STATE OF CALIFORNIA, this \_\_\_\_\_ day of \_\_\_\_\_ one thousand nine hundred and \_\_\_\_\_

Not valid unless countersigned by GEORGE E. BILLINGS, Marine Agent.

A. M. FOLLANSBEE, Jr.,  
Marine Secretary.

WM. J. DUTTON,  
President.

WHEREAS it hath been proposed to the FIREMAN'S FUND INSURANCE COMPANY by Trojan Powder Co.

as well in his or their own name as for and in the name and names of all and every other person or persons, to whom the subject matter of this policy does may or shall appertain in part or in all to make with the said Company the Insurance hereinafter mentioned and described.

Now this Policy Witnesseth that in consideration of the said person or persons effecting this Policy promising to pay to the said Company the sum of One Hundred & Seventy-Five and 00/100ths.....DOLLARS as a premium at and after the rate of 1/4% per cent for such Insurance the said Company takes upon itself the burthen of such Insurance to the amount of Thirty-Five Thousand and 00/100.....DOLLARS

and promises and agrees with the insured their Executors, Administrators and Assigns in all respects truly to perform and fulfill the Contract contained in this Policy. AND it is hereby agreed and declared that the said Insurance shall be and is an Insurance (lost or not lost) at and from San Francisco Bay to Balboa.

AND it is also agreed and declared that the subject matter of this Policy as between the Assured and the said Company so far as concerns this Policy shall be and is as follows upon \$35,000—on 6000 cases High explosives.

laden (under deck) on board  
the Ship or vessel called the Str. "Pleiades"

General average payable as per Foreign Statement or per York-Antwerp Rules of 1890 if in accordance with the Contract of Affreightment Warranted that should the vessel ground within the limits of the Columbia and/or Willamette and/or Fraser Rivers and/or Sues Canal and/or Manchester Ship Canal or its connections and/or in the River Mersey above Rock Ferry Slip, such grounding not to be deemed a stranding, but Underwriters to pay for any damage which may be proved to have directly resulted therefrom.

In the event of the vessel making any deviation or change of voyage, it is mutually agreed that such deviation or change shall be held covered at a premium to be arranged, provided due notice be given by the assured on receipt of advice of such deviation or change of voyage. Including risk of craft and boats to and from the ship or vessel each craft or boat to be deemed a separate risk.

All questions of liability arising under this policy are to be governed by the laws and customs of England. This Policy is issued in duplicate. Freight warranted free from any claim consequent upon loss of time whether arising from a peril of the sea or otherwise.

The preceding clauses and all clauses annexed hereto or stamped hereon shall control other printed conditions inconsistent with the same.

DUPLICATE

ENGLISH CARGO

FIREMAN'S FUND  
INSURANCE COMPANY

—OF—

SAN FRANCISCO, CALIFORNIA

---

*No.* 307264

*Date* August 7, 1912.

---

*Vessel*

Str. "Pleiades"

*Assured*

Trojan Powder Co.

---

£ \$35,000      at  $\frac{1}{2}$  %      %

£ \$1750.00

---

Head Office, Company's Building  
California and Sansome Streets.

Service of the within answer and receipt of a copy is hereby admitted this 1st day of November, 1913.

NATHAN H. FRANK,

IRVING H. FRANK,

Attys. for Plaintiff,

[Endorsed]: Filed Nov. 1, 1913. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [36]

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*In the District Court of the United States, in and for the Northern District of California, Division Two.*

TROJAN POWDER COMPANY, a Corporation,  
Plaintiff,

vs.

FIREMAN'S FUND INSURANCE COMPANY, a Corporation,

Defendant.

**Waiver.**

The defendant above named hereby expressly waives a trial by jury in the above-entitled action.

McCUTCHEN, OLNEY & WILLARD,

Attorneys for Defendant.

The plaintiff also waives a jury.

NATHAN H. FRANK,

Atty. for Plff.

[Endorsed]: Filed March 2d, 1914. Walter B. Maling, Clerk. [37]

At a stated term, to wit; the March term A. D. 1914 of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the Court-room in the city and county of San Francisco, on Tuesday the 26th day of May in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 15,660.

TROJAN POWDER CO.,

vs.

FIREMAN'S FUND INSURANCE CO.

**Minutes of Court—May 26, 1914—Order Discharging Jury.**

The parties being present as heretofore and the jury heretofore impaneled also being present, there-upon the trial was resumed and by stipulation of counsel for both sides in open Court, the jury was discharged from further consideration herein and the trial proceeded with before the Court sitting without a jury. [38]

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At a stated term, to wit; the March term A. D. 1914 of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the Court-room in the city and county of San Francisco, on Monday the 29th day of June in the year of



our Lord one thousand nine hundred and fourteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 15,660.

TROJAN POWDER CO.,

vs.

FIREMAN'S FUND INSURANCE CO.

**Minutes of Court—June 29, 1914—Order for Judgment.**

This cause heretofore tried and submitted being now fully considered and the Court having rendered its oral opinion, it was ordered that judgment be entered in favor of plaintiff and against defendant as prayed on special findings to be prepared and filed.

[39]

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*In the District Court of the United States, in and for the Northern District of California, Second Division.*

No. 15,660.

TROJAN POWDER COMPANY, a Corporation,  
Plaintiff,

vs.

FIREMAN'S FUND INSURANCE COMPANY, a  
Corporation,

Defendant.

**Findings of Fact and Conclusions of Law.**

This cause coming on for trial, and having been tried before the Court, a jury trial having been

waived by the parties, Nathan H. Frank appearing for the plaintiff, and Ira A. Campbell appearing for the defendant, and having heard the allegations and proofs of the parties, and the argument of counsel, and being advised in the premises, I hereby make and file the following Findings of Fact and Conclusions of Law constituting my decision in the said action.

### FINDINGS OF FACT.

1. That the said cargo was being transported in the said steamer "Pleiades" under a contract of carriage with the California Atlantic Steamship Company, wherein and whereby it was provided that freight, whether prepaid or to be collected, was to be considered as earned vessel or goods lost or not lost at any stage of the entire transit; that on the happening of any of the contingencies in said contract of carriage mentioned, said carriers were to have the right to forward said cargo to the port of destination on their own ships, and should receive extra compensation for such service, whether performed by their own vessels or those of strangers; that among the contingencies so provided in said bill of lading were, stranding, straining, and any accidents or perils of the [40] sea. That the said plaintiff had prepaid the freight for the carriage of said cargo from the port of San Francisco to the port of Balboa, in the sum of Four Thousand Nine Hundred and Fifty (\$4,950) Dollars.

2. That said steamer "Pleiades" departed on her voyage in said policy mentioned, with said 6,000 cases of high explosives on board thereof, and while

on said voyage, was on the 16th day of August, 1912, stranded off the coast of Mexico, and then and there, together with her cargo, was in danger of becoming a total loss; that the said plaintiff then and there abandoned said cargo to said defendant, which abandonment said defendant then and there refused to accept; that thereafter such salvage operations were undertaken as resulted in the floating and saving of said vessel and her cargo; that the said vessel was then and there in such damaged condition that she was unable to proceed upon her said voyage, but was brought back to the port of San Francisco for repairs, where the said cargo was discharged into lighters; that the said repairs on said vessel were not completed until December 27, 1912, and said steamer never resumed or otherwise performed said voyage, but said voyage was wholly abandoned by said steamer; that the nature of said goods, and the purpose for which said goods were intended, would have rendered it unreasonable to detain them until the completion of repairs.

3. That in order to transport the said cargo to its port of destination, the said plaintiff was compelled to, and did, on the 15th day of October, 1912, reship and forward the said cargo on the steamer "Mackinaw" belonging to the said carrier California Atlantic Steamship Company, and transported said cargo therein from the port of San Francisco to the port of Balboa, for which service the said plaintiff was then and there compelled to, and did, pay additional freight in the sum of Four Thousand Fifty (\$4,050) Dollars. [41]

4. That the said plaintiff demanded payment of the said insurance company of the said sum so paid by it to forward the said cargo to said port of destination, but said defendant has refused to pay the same, or any part thereof, and no part thereof has been paid.

5. That it is the law of England that if, by reason of damage done to the ship, she cannot be repaired without great loss of time, the master is at liberty to procure another ship to transport the cargo to the port of destination; that there is no absolute obligation on the part of the master towards the owner of the goods to forward them in the original ship.

6. That it is the law of England that where freight is paid in advance, and the contract provides that it is to be considered as earned, vessel or goods lost or not lost at any stage of the entire transit, such freight is earned by the ship owner when the cargo is received on board, and the right of the ship owner thereto does not depend on the delivery of the cargo at the port of destination.

7. That it is the law of England, that in case of marine insurance on merchandise, when, in consequence of a peril insured against, an extra freight must be paid by the cargo owner to bring said merchandise to the port of destination, such expense is a loss directly due to such peril insured against for which the insurer is liable.

8. That under the policy and the facts admitted by the pleadings in the case at bar, in connection with the facts herein found by this Court, it is the



practice and custom of underwriters in England to pay the excess of the expense to which the owner of the goods is put in bringing them to their destination over the freight originally paid, as a loss directly due to such perils.

9. That under the law of England, it was not the obligation [42] of the carrier in consideration of the original freight whether prepaid or not, to complete said voyage with said steamer "Pleiades" upon the completion of the repairs to said steamer necessitated by such stranding and to transport the said cargo to its port of destination without requiring the payment of the second freight therefor.

10. That the reshipment and forwarding of said cargo on said steamer "Mackinaw" to said port of Balboa, and the payment of additional freight, were not voluntary on the part of the said plaintiff, and were caused by perils of the sea insured against by said policy, and under the laws of England did constitute a loss, charge and liability under the terms and conditions of said policy.

11. That under the law of England, if, by reason of the specific purpose for which said goods were intended, said goods could not be detained at said port of San Francisco until the completion of the repairs of said vessel and thence forwarded in said steamer to the port of destination, and if upon re-shipment of said goods to destination an additional freight was paid by plaintiff, such extra freight did constitute a loss, charge and liability under said policy, and was caused by perils insured against by said policy.



12. That under the law of England, the payment of said extra freight was due to a peril insured against by said policy, and resulted in a loss which said policy did cover.

13. That under the law of England, there was no concealment by the plaintiff from the defendant of facts material to the risk, and said policy was not voided.

### CONCLUSIONS OF LAW.

As conclusions of law from the foregoing facts, the Court finds:

1. That the defendant is indebted to the said plaintiff, and the said plaintiff is entitled to recover from the said defendant, the sum of Four Thousand and Fifty (\$4,050) Dollars, together with [43] interest thereon from the 15th day of October, 1912.

2. That the said plaintiff is entitled to a judgment for costs against said defendant.

Judgment is hereby ordered to be entered accordingly.

Dated October 21st, 1915.

WM. C. VAN FLEET,

Judge.

Receipt of a copy of the within findings of fact and conclusions of law is hereby admitted this 28th day of June, 1915.

McCUTCHEN, OLNEY & WILLARD,

Attorneys for Defendant.

[Endorsed]: Filed October 21, 1915. Walter B. Maling, Clerk. [44]

*In the District Court of the United States, in and for  
the Northern District of California, Second  
Division.*

No. 15,660.

TROJAN POWDER COMPANY, a Corporation,  
Plaintiff,

vs.

FIREMAN'S FUND INSURANCE COMPANY, a  
Corporation,  
Defendant.

**Judgment on Findings.**

This cause having come on regularly for trial on the 22d day of May, 1914, before the Court sitting without a jury, a trial by jury having been specially waived by stipulation filed herein; Nathan H. Frank and Irving H. Frank, Esqrs., appearing as attorneys for plaintiff and Ira A. Campbell, Esq., appearing as attorney for defendant; and the trial having been proceeded with on the 26th and 27th days of May, 1914, and oral and documentary evidence on behalf of the respective parties having been introduced and closed and the cause having been submitted to the Court for consideration and decision; and the Court, after due deliberation, having filed its special findings in writing, and ordered that judgment be entered herein in accordance therewith:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that Trojan Powder Company, a corporation,

plaintiff, do have and recover of and from Fireman's Fund Insurance Company, a corporation, defendant, the sum of Four Thousand Nine Hundred Five and 23/100 (\$4,905.23) Dollars, together with its costs herein expended taxed at \$108.70.

Judgment entered October 21, 1915.

WALTER B. MALING,

Clerk.

A True Copy, Attest:

[Seal]

WALTER B. MALING,

Clerk. [45]

[Endorsed]: Filed Oct. 21, 1915. Walter B. Maling, Clerk. [46]

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*In the District Court of the United States, for the  
Northern District of California.*

No. 15,660.

TROJAN POWDER COMPANY, a Corporation,  
vs.

FIREMAN'S FUND INSURANCE COMPANY, a  
Corporation,  
**(Clerk's Certificate to Judgment Roll.)**

I, W. B. Maling, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the Judgment Roll in the above-entitled action.

ATTEST my hand and the seal of said District Court, this 21st day of October, 1915.

[Seal]

WALTER B. MALING,

Clerk.

By J. A. Schaertzer,

Deputy Clerk.

[Endorsed]: Filed Oct. 21, 1915. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[47]

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*In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.*

No. 15,660.

TROJAN POWDER COMPANY, a Corporation,  
Plaintiff,

vs.

FIREMAN'S FUND INSURANCE COMPANY,  
a Corporation,

Defendant.

**Bill of Exceptions.**

BE IT REMEMBERED that on the 22 day of May, 1914, at a stated term of the District Court of the United States for the Northern District of California, the above-entitled cause came on regularly for trial before the Honorable Wm. C. Van Fleet, Judge of the said Court, the jury having been during the course of the trial duly waived in the manner required by law in writing, Nathan H. Frank, Esq., appearing as attorney for the plaintiff, and Ira

A. Campbell, Esq., appearing as attorney for the defendant.

And thereupon the following proceedings were had:

Mr. Frank and Mr. Campbell made their opening statements to the jury.

Mr. Frank offered in evidence the policy of insurance. It was received in evidence and marked "Plaintiff's Exhibit No. 1" and is hereunto annexed, marked "Exhibit No. 1."

Mr. Frank then offered in evidence the contract of affreightment, to which offer the following objection was made: [48]

**Testimony of W. P. Mulhern, for Plaintiff.**

Mr. CAMPBELL.—We object to the admission on the ground that it is incompetent, irrelevant and immaterial and not binding upon the defendant Insurance Company in any of the matters which are affected by the issues in this case.

The Court thereupon overruled defendant's said objection and received in evidence and marked said document as "Plaintiff's Exhibit No. 2," to which order defendant excepted and defendant now assigns said exception to said ruling as Defendant's Exception No. 1.

Said document is hereunto annexed and marked "Exhibit No. 2."

W. P. MULHERN was then called for plaintiff, was sworn, and testified as follows:

I am agent of the Trojan Powder Company at this port. I carried on the transactions here in controversy.



(Testimony of W. P. Mulhern.)

After the cargo came back here I did everything I possibly could to have the cargo forwarded to the port of destination by taking it up with the Insurance Company and the Steamship Company. I made application to the California Atlantic and Pacific Mail, the only two companies handling freight of that kind to the port of Ancon, Balboa. I called on Mr. Page (defendant's agent) to ascertain what action his Company would take in regard to seeing that the shipment was forwarded without delay upon the first available boat. He refused, I believe, to have anything to do with it; he said it was a matter out of his hands. Then I went to both the Pacific Mail and California Atlantic. The latter had the first boat going out, namely, the "Portland," September the 7th, but the shipment on the "Pleiades" had not returned at that time. I made these inquiries before the cargo got back. After the cargo got back the first ship was the "Mackinaw," run by the California [49] Atlantic. I went to them and asked them if they would return it without an additional freight, and they absolutely refused to do that, so in the end I was compelled to reserve space on the "Mackinaw," which I believe left on October 17th. I had to pay the California-Atlantic a freight charge of \$4,050, to carry it forward on the second voyage. They would not take the shipment forward on the "Mackinaw" for the same freight money that had been paid for forwarding it on the "Pleiades." They required another payment according to the terms of the bill of lading.

(Testimony of W. P. Mulhern.)

Mr. FRANK.—What was the necessity of getting that cargo forwarded at that time?

A. If we did not deliver it within a certain time we were subject to a penalty of one-tenth of one per cent per day and were liable to have the shipment refused. Upon the condition their contract provided for that.

I don't believe there is any market at the port of destination other than the Panama Canal Commission for any considerable amount of explosives, and particularly, for those grades, as one of them was a grade of 45% and the other 60, and the demand for 60 is not nearly as great as the lower grades.

The vessel was repaired and redelivered to the California-Atlantic on December 27th, 1912.

I believe we received a notice that the California-Atlantic had gone into bankruptcy about January 1st or 2d, 1913.

Mr. FRANK.—Do you know whether the vessel ever went on that voyage?

Mr. CAMPBELL.—We object to that as being irrelevant and immaterial. [50]

The Court thereupon overruled defendant's said objection, to which order defendant excepted, and defendant now assigns said exception to said ruling as Defendant's Exception No. 2.

A. It never did.

Mr. Frank then offered in evidence a copy of the notice of abandonment, to which offer the following objection was made:

Mr. CAMPBELL.—I object to it being offered and

(Testimony of W. P. Mulhern.)

received in evidence for the reason that it is incompetent, irrelevant and immaterial. The question of the claim for a constructive total loss on this policy is not an issue in this case and the only purpose of the abandonment now is to make a constructive total loss a valid claim under the policy.

The COURT.—I cannot intelligently determine whether eventually it will turn out to be material or not. I will have to admit it in evidence subject to its being hereafter stricken out if it is not in anywise connected.

The said notice of abandonment was thereupon introduced in evidence and marked "Exhibit No. 3," a copy of which is hereto attached and made a part of this Bill of Exceptions and marked "Plaintiff's Exhibit No. 3."

Thereafter, Mr. Campbell made the following motion:

Mr. CAMPBELL.—If the Court please, I move to strike out the notice of abandonment which was offered in evidence. Your Honor will recall that I objected to its admission upon the ground that there was no question of constructive total loss in the case and that the only purpose the notice of abandonment could serve would be to lay a foundation for a recovery as for a constructive total loss. [51]

Mr. FRANK.—The purpose of putting in evidence the notice of abandonment was not to create a constructive total loss, but to bring the case within the provisions of the decision of Great Peninsula Railway

Company v. Saunders. That was the entire purpose of it.

The COURT.—I think that was conceded at the time, substantially. \* \* \*

The COURT.—I think the motion to strike will at this time be denied; I am not prepared to say that it may not have a material bearing upon certain features of the case.

The Court thereupon overruled defendant's said objection and denied defendant's said motion to strike out said notice of abandonment, to which orders defendant excepted, and defendant now assigns said exception to said rulings as Defendant's Exception No. 3.

Mr. Frank then offered and read in evidence Section 214 of Arnould on Marine Insurance (8th ed.) as follows:

“When, in consequence of a peril insured against, the voyage cannot be accomplished in the original ship, it seems that the excess of the expense to which the owner of the goods is put in bringing them to their destination over the freight which he would have had to pay in the ordinary course is a loss directly due to such peril. The practice of underwriters has been to pay such excess as particular charges, and as one of the objects of an insurance on goods is to guarantee that the goods shall reach their destination, it is submitted that this practice is correct in principle. It is certainly not inconsistent with the provisions of the Marine Insurance Act.”



Mr. FRANK.—I am going to read the Insurance Act in connection with this, and in that connection I think it is pertinent. He referred in the note to that Act, and that is the reason it becomes pertinent,—Sec. 64, subd. 2 of the Marine Insurance Act, which [52] is what the author refers to by indicating it in the note.

Thereupon, counsel read as follows:

“Expenses incurred by or on behalf of the assured for the safety or preservation of the subject matter insured, other than general average and salvage charges are called ‘particular charges’. Particular charges are not included in ‘particular average.’ ”

Mr. FRANK then offered and read in evidence Section 869 of Arnould on Marine Insurance (8th ed.) as follows:

“Another class of losses, which, though not specially enumerated in the policy, are nevertheless recoverable thereunder, is that which is embraced under the term ‘particular charges.’ The distinction between ‘particular charges’ and ‘particular average’ was first definitely established in our Courts in *Kidston v. Empire Insurance Co.*, where the jury after hearing the evidence of several average-adjusters and other witnesses, found that there was in the business of marine insurance a well-known and definite meaning affixed by long usage to the term ‘particular average’ as distinguished from the term ‘particular charges’—viz., that ‘particular average’ denotes actual damage done to or loss of part of the subject matter of insurance, but that it does not include any



expenses or charges incurred in recovering or preserving the subject-matter of insurance; and that expenses incurred in warehousing and forwarding goods are not 'particular average,' but are termed 'particular charges.'

"Accordingly sec. 64, sub-sec. (2), of the Marine Insurance Act states that 'expenses incurred by or on behalf of the assured for the safety or preservation of the subject-matter insured, other than general average and salvage charges, are called 'particular charges. Particular charges are not included in particular average.' They are recoverable from underwriters when incurred after the arising of a peril insured against, in order to prevent such peril causing a loss for which the underwriters would be liable, if it were so caused. In this event they are charges incurred 'in and about the defense and safeguard' of the subject-matter of insurance, within the suing and laboring clause. In certain cases they may also be recoverable from underwriters, apart from the suing and labouring clause, as losses occasioned by a peril insured against when they have been necessarily incurred in consequence of such a peril—as, for example, expenses of warehousing and forwarding cargo, when a peril insured against has occasioned the necessity of such expenditure.'" [53]

Mr. Frank then offered and read in evidence the case of *Barker v. Blakes*, 9 East's Rep. 282, as follows:

"This was an action on a policy of insurance on a quantity of oil by the ship 'Hannah,' at and from New York to Havre de Grace, dated the 4th of Au-

gust, 1803; which was tried before Lord Ellenborough, C. J., at the sittings at Guild Hall after Hilary term 1807, when a verdict was found for the plaintiff for 45£, 2s. 8d., subject to the opinion of this Court on the following case:

“The insurance was effected on behalf of the plaintiff, an American citizen resident in America, and the proprietor of the oil. The defendant subscribed the policy for 100£. The oil was of greater value than the amount of all the insurance made upon it. The ship ‘Hannah’ was an American ship, duly documented, and sailed from New York on the voyage insured on the 4th of July, 1803, with the oil on board; and on the 17th of August following was arrested in latitude 49 degrees north, longitude 8 degrees west, (being in the course of the voyage), by ‘The True Blue,’ a British privateer, and sent into Bristol where she arrived on the 30th of the same month. Havre de Grace is in latitude 49 degrees north, longitude 6 minutes east. On the 21st of June, 1803 the following decree was issued by the French Government, ‘That from thence forth there shall not be received into any of the ports of the French Republic any colonial commodity coming from English colonies, nor any goods coming directly or indirectly from England.’ ‘Consequently all goods and merchandise of English manufacture, or coming from English colonies, shall be confiscated.’ On the 6th of September 1803, the British Government declared the port of Havre to be in a state of blockade; and such blockade has continued ever since. The ship and cargo were libelled in the court of Ad-

miralty by the captors; and on the 8th of October following the ship and the oil in question, and the rest of the cargo, were, by a sentence of that Court, ordered to be restored to the use of the owners; subject to the payment of freight and expenses, but without costs or damages; except one box of books, which was condemned as French property; and 53 hogs-heads of bark, and 3646 pounds of whalebone, which were then reserved for further proof, and were afterwards condemned as lawful prize by the following sentence: ‘“Hannah,” Augustus Ryan, 9th Nov. 1804. No further proof having been exhibited of the property of 53 hogsheads of bark, and 3646 lb. of whalebone; and the Judge, at the petition of Bog, on motion of counsel, by interlocutory decree, condemned the said goods as good and lawful prize to Edward Vincent Paul, commander of the private ship of war “True Blue,” in sight of his Majesty’s ship of war “Phoenix,” Wm. Baker, Esq. commander.’ On the 14th of [54] October, 1803 the plaintiff’s agents in this country, who had effected the policy, abandoned the oil in question to the defendant and the other underwriters, in proportion to their respective interests. The agents of the plaintiff were apprised of the detention of the vessel, and of the suit in the Court of Admiralty, soon after they respectively took place; but were not parties to the suit, and did not know of the restoration of the vessel and cargo until the 17th of October, three days after the abandonment. The plaintiff’s agents afterward applied to the captain of the ship ‘Hannah’ to reload the oil

and convey it to Havre, which he positively refused to do, and declared that he should sail directly to New York. The ship 'Hannah' cleared out at Bristol on the 20th of December 1803 for New York, and in January 1804 sailed for that place, leaving the oil in question at Bristol. The oil was afterwards sold in this country by agreement, without prejudice to the question between the assured and underwriters, to the best possible advantage; and the loss amounted in the whole to 45£ 2s. 8d. per cent, of which the freight and expenses of restoration, paid under the sentence of the Court of admiralty, amounted to 20£ 19s.; that is, the freight alone to 12 per cent, the expenses to 8£ 19s. per cent. The question for the opinion of the Court was, whether the plaintiff were entitled to recover the whole, or any and which of the said sums? If the Court should be of the opinion that he was entitled to recover anything, the verdict was to be entered accordingly; otherwise a nonsuit was to be entered.

"Lord ELLENBOROUGH, C. J., delivered judgment.

"This was an action on a policy of insurance, dated the 4th of August, 1803, on a quantity of oil belonging to an American proprietor, shipped on board an American ship, the 'Hannah,' on a voyage at and from New York to Havre de Grace. (After stating the case, his Lordship proceeded.)

"The whole amount of loss claimed on the part of the plaintiff is 45£ 2s. 8d., consisting of 20£ 19s., the freight and expenses paid under the sentence of the Court of Admiralty, and 24£ 3s. 8d., the differ-



ence, I presume, between the invoice value of the oil in America, and the proceeds of the sale here. The defendant contends, that the plaintiff is at any rate not entitled to recover the latter item of loss; his claim thereto being merely founded on an abandonment which was not made, as the defendant insists, in due time. But he further contends, that the plaintiff cannot by law recover at all, even to the extent of the average loss of his freight and expenses, under this policy; and that to allow of such a recovery would be to allow of an indemnity being afforded, through the medium of British insurance, to neutrals, acting in contravention of [55] the interests and policy of Great Britain, in the carrying of the goods of its enemies. That in so doing the neutral had, in effect, violated the duties of his neutrality, and assumed a hostile character in respect to this country. But it does not appear to us, that this general objection to the plaintiff's right to recover is well founded. The American was at liberty to pursue his commerce with France, and to be the carrier of goods for French subjects; at the risk, indeed, of having his voyage interrupted by the goods being seized; or of the vessel itself, on board of which they were, being detained or brought into British ports, for the purpose of search; but the mere act of carrying such enemies' goods on board his vessel constituted no violation of neutrality on the part of the American; nor did the arrest and detention of his vessel, for the purpose of search and eventual condemnation of the goods which might be found on board belonging to the enemy, form any



breach of our duty towards the American. The indemnity sought under the policy in this case is not an indemnity to an enemy, or to a neutral forfeiting his neutrality by an act hostilely done by him against the interests of Great Britain; but an indemnity to a neutral, as such against the consequences of an act innocently and allowably done by him in the exercise of his own neutral rights; and as innocently and allowably to a certain degree controlled and interrupted on our part, in the exercise of our rights, as belligerents, against enemies' property found on board the ship of a neutral. These rights, though they are in a degree adverse to each other, do not, therefore, in the exercise of them, necessarily place either party in the situation of an enemy to the other. The various competitions for commercial advantage and superiority, which take place between different nations; their mutual exclusions of each other by their respective municipal regulations; are so many acts of adverse policy and conflicting rights, exercised towards each other; but they occur without producing any breach of national amity. And it has never yet, in any instance that I am aware of, been held a breach of implied duty in the subjects of either state to lend their assistance by insurance or otherwise to such rival or exclusive commerce or interests of the other. Cases of express public prohibition, and that degree of assistance to enemies which constitutes a society in war against any particular state, fall of course under a different consideration, and are necessarily to be understood as interdicted subjects of insurance

in every country to which this species of contract is known. The voyage and commerce, therefore, in the course of which the vessel carrying the goods insured was in this case engaged, not being either of a hostile description, nor in any other way expressly or impliedly forbidden by [56] the law or policy of this country, the general objection to the plaintiff's recovery at all under this policy of assurance falls to the ground. Which brings the case under our consideration to this point, whether the plaintiff be entitled, under the circumstances, to recover as for a total loss, or for the freight and expenses adjudged by the Court of Admiralty to be paid, as an average loss only.

“In order to entitle himself to recover as for a total loss, the plaintiff must establish two things: First, That a loss of the voyage (the only description of loss which can be contended for in this case, as the goods themselves have been ordered to be restored, and are capable of being so), was occasioned by the detention in question, which continued until and after the blockade took place, which rendered the prosecution of the voyage to Havre no longer practicable; and, secondly, (supposing a loss so occasioned to be a total loss, ‘by detention,’ within the policy); that the abandonment of the goods was made in due time. And thinking, as we do, that the impossibility of prosecuting the voyage to the place of destination, which arose during and in consequence of the prolonged detention of the ship and cargo, may be properly considered as a loss of the voyage; and such loss of voyage, upon received principles of

insurance law, as a total loss of the goods which were to have been transported in the course of such voyage; provided such loss had been followed by a sufficiently prompt and immediate notice of abandonment. We are of opinion, however, upon the authority of the cases adverted to in the argument, that this abandonment which was made on the 14th of Oct. 1803, above five weeks after the blockade of Havre had been publicly notified; the latest event to which the loss of voyage is capable of being referred; was not made within those reasonable and convenient limits of time which the law allows for this purpose. And it is to be observed, that no excuse for the lateness of the abandonment is offered on the score of any want of competent powers in the parties making the abandonment; as they do not appear to have been furnished with any other powers for this purpose at last, than what they must be supposed to have originally possessed, if they ever had any. The loss in question must, therefore, for want of a timely notice of abandonment, be regarded merely as an average loss; and the verdict must of course be restricted to the sum of 20£ 19s. the amount of the freight and expenses to which the assured was subjected by the sentence of the Court of Admiralty. Judgment for that sum, and no more, must be given accordingly.” [57]

Mr. Frank then offered and read in evidence the case of *Great Indian Peninsula Ry. Co. v. Saunders*, 1 Ellis, Best & Smith, Q. B. 41; 121 English Reprint, 630, as follows:

“In November, 1858, the plaintiffs shipped at

London on board The 'Bombay' bound for Kurra-  
chee and Bombay, with leave to call at Cork for  
troops about 480 tons of iron rails, to be conveyed to  
Bombay for the plaintiffs, upon the terms of the fol-  
lowing bill of lading.

'Shipped in good order and well conditioned, by  
The Great Indian Peninsula Railway Company, in  
and upon the good ship called The 'Bombay,'  
whereof is master for the present voyage Hamanck,  
and now riding at anchor in the river Thames, and  
bound for Bombay, with liberty to land passengers  
at Kurrachee, 1995 bars railway iron, being marked  
and numbered as in the margin, and are to be deliv-  
ered in the like good order and well conditioned at  
the aforesaid port of Bombay (the act of God, the  
Queen's enemies, fire, and all and every other dan-  
gers and accidents of the seas, rivers and navigation  
of whatever nature and kind soever excepted, save  
risk of boats as far as ships are liable thereto) unto  
the secretary of the said Company, or to his assigns,  
freight for the said goods, to be paid here, ship lost  
or not, with primage and average accustomed. In  
witness whereof the master or purser of the said ship  
hath affirmed to four bills of lading, all of this tenor  
and date, the one of which bills being accomplished  
the others to stand void. Dated in London, 2d  
November, 1858. Weight and contents unknown to  
THOMAS HAMANCK.'

"In the margin were inserted the particulars of  
the rails, together with this note. 'Weight, contents  
and value unknown, and not answerable for leakage,



breakage or rust, nor loss by vermin. E. Gellatt, for D. Dunbar.'

"On the 2d day of November, 1858, the plaintiffs paid to the owners of The 'Bombay' the sum of 629£ 9s. 10d. for freight on the rails mentioned in the bill of lading, being at the rate of 25s. per ton.

"On the 11th day of November, 1858. the plaintiffs effected a policy of insurance at Lloyd's for the sum of 4500£ on rails valued thereat, 'warranted free from particular average, unless the ship be stranded, sunk or burnt. General average payable according to foreign statement' etc. The defendant subscribed this policy for the sum of 50£.

"The sum of 4500£ mentioned in the policy as the value of the rails included their first cost, and also the above-mentioned freight, as well as the insurance and shipping charges.

"Soon after The 'Bombay' sailed she experienced very heavy gales, had all her masts carried away by [58] tempests, became entirely disabled, and was eventually towed into Plymouth, on December 5th, 1858, by Her Majesty's ship 'Argus.' On her being surveyed, it was ascertained that the expense of repairing her would exceed her value when repaired, and thereupon notice of abandonment of the voyage was given to the shippers by the shipowners, and she was shortly afterwards broken up; the expense of repairing her being an expense which no reasonable person would have incurred.

"The iron rails which the plaintiffs had shipped in The 'Bombay' were without delay taken out of her by the plaintiffs, and by them shipped to London,



and there shipped by the plaintiffs on board three other vessels. At the time of that shipment the rates of freight had risen, and the plaintiffs were compelled to pay freight at the rate of 30s. per ton on the rails shipped in one of them, and of 40s. per ton on those shipped in the other two, such freights amounting in the whole to 825£ 11s. 7d. The three vessels into which the rails were shipped arrived in due course at Bombay, with the rails on board in safety.

“The question for the opinion of the Court was, whether the defendant, as one of the underwriters, was liable to pay to the plaintiffs his proportion of that sum of 825£, 11s. 7d., or any part thereof.

\* \* \*

“BLACKBURN, J.—In this case the plaintiffs insured themselves by the ship *Bombay*, on a voyage to Kurrachee or Bombay, by a policy in the ordinary form of a Lombard Street policy, on ‘rails valued at 4500£., warranted free from particular average; unless the ship be stranded, sunk or burnt.’ It is upon this warranty that our judgment depends.

“It appears, by the statement in the special case, that the goods were shipped on board the ‘*Bombay*,’ to be carried on the voyage for a sum, inaccurately called freight, to be paid here, ship lost or not lost. The ship was, by perils of the seas, disabled and obliged to put into Plymouth, in such a state that she was not worth repairing; and no doubt, therefore, there was what is commonly called a constructive total loss of the ship; but she was neither stranded, sunk, nor burnt. The rails—the subject-matter of the insurance—were saved, and were sent on in other

vessels to their destination; and, in order to forward them to their destination, it was necessary to pay freight to the extent of 825£, 11s, 7d. As the original contract of carriage was for a sum to be paid here, ship lost or not lost, the whole of this sum of 825£, 11s, 7d, was an extra expense incurred by the shippers of the goods, in consequence of the sea risk which had frustrated the voyage of the 'Bombay'; and the question we have to determine is, whether the insured can recover this sum on a policy containing this warranty. [59]

"In *Mumford v. The Commercial Insurance Company*, 5 Johns. Rep. (U. S.) 262, cited 1 Phill. on Insurance 678, 3d ed., the insured on a policy, in which there was no warranty against particular average, recovered in the courts of New York on a claim similar to this. No such decision has been come to in the courts of this country; and we are not called upon in this case to determine whether, in the absence of such a warranty, the party could or could not recover; for we are of opinion that, if he could recover, it would be on the ground that the disbursement for the extra freight was part of the loss occasioned to the owner of these particular goods by the perils of the seas, or, in other words, a particular average on these goods; and, therefore, within the warranty.

"Mr. James contended that 'particular average' bore a more restricted meaning—that it was confined to losses arising from injury to, or deterioration of, the goods themselves, and did not include expenses incurred in relation to the goods; but we find no authority for this. In *Arnould on Insurance*, p. 970 (2d

ed), we find the definition of a particular average stated to be 'loss arising from damage accidentally and proximately caused by the perils insured against, or from extraordinary expenditures necessarily incurred for the sole benefit of some particular interest, as of the ship alone, or the cargo alone.' And the same learned author says, at p. 875, "that an insurance on goods warranted free of average unless general, is equivalent to an insurance against their total loss only"; which indeed necessarily follows from the definition already quoted. Mr. Phillips, in his *Treatise on Insurance*, Sec. 1422, defines particular average to be, 'a loss borne solely by the party upon whose property it takes place, and is so called in distinction from a general average, for which different parties contribute.' The same learned author, in Sec. 1767, says that an insurance against total loss, only, and an insurance with the exception of particular average, are equivalent forms.

"No case has been cited, nor are we aware of the existence of any, tending to show that these definitions of particular average are inaccurate.

"We think that we must put the same construction on this policy as if it had been expressed to be 'against total loss and general average only'; and, if so, it is self-evident that the claim in the present case cannot be in any way treated as a total loss, or a general average.

"It was, however, further argued by Mr. James that the plaintiffs were entitled to recover under the clause which authorizes the insured to sue and labour for the preservation of the subject-matter of the in-

insurance. It is not necessary to decide whether an underwriter on a policy against total loss only is, [60] under this clause, liable for expenses incurred by the assured for the purpose of rescuing the subject-matter of an insurance from a state of peril which might have resulted in a total loss, but did not. There are reasons both for and against this stated by Mr. Phillips in his *Treatise on Insurance*, Sec. 1777; and the question seems never to have been actually decided. But in the present case it does not arise. The expenses here were incurred for the purpose of forwarding the subject-matter of insurance to its destination, at a time when the iron was not in any peril of total loss, either actual or constructive. Had the insured chosen, instead of paying this extra freight, to sell the rails in England, as he might have done if he pleased, he could have made no claim on the underwriters; for it would not have been a constructive total loss, according to *Rosetto v. Gurney*, 11 C. B. 176 (E. C. L. R., Vol. 73), unless the amount of the extra freight exceeded the value of the goods when forwarded which is not the case here; and an actual total loss is out of the question.

“It seems to us that the plaintiffs here cannot in any view recover, unless we deprive the warranty of the effect which it was intended to have. We therefore give judgment for the defendant.”

Mr. Frank then offered the case of *Popham and Willett v. The St. Petersburg Ins. Co.*, 10 Commercial Cases, 31, to which offer the following objection was made:

Mr. CAMPBELL.—If the Court please, I object



to the admission of that case in evidence for this reason: that case is founded upon a form of policy which contains an express clause covering forwarding charges. The clause in that policy is entirely distinct and different from the clause in this policy.

The Court thereupon overruled defendant's said objection, to which order defendant excepted, and defendant now assigns said exception to said ruling as Defendant's Exception No. 4.

And the Court thereupon permitted said case to be read in evidence as follows: [61]

"By policies dated July 8/20, 1899, issued under a floating policy of earlier date, the defendants insured the plaintiff's goods and freight by named steamers for a voyage from London to places on the rivers Obi and Yenisei in Siberia, via. the Kara Sea; the policies enumerated the usual perils and were expressed to be 'warranted free from average unless general, or the ship be stranded, sunk, on fire, damaged by ice or in collision,' and they also contained the following clauses:—"To pay landing, warehousing, and forwarding charges should the same be incurred as well as partial loss arising from transshipment and/or re-shipment."

" 'On English Lloyd's conditions and to cover all risks as per bill of lading, including the negligence clause and the risk of collisions and/or contact with ice and/or any substance other than water.' "

"These policies were taken out by the plaintiffs in contemplation of an expedition for the importation of goods into Siberia, via. the Kara Sea and up the rivers Obi and Yenisei, by lighters. The advantage

of this route was that by it goods were admitted into Siberia at a low rate of duty, whereas the duty which would have to be paid on goods passing through European Russia was very heavy. The plaintiffs had successfully carried out similar expeditions in the years 1897 and 1898. The present action arose out of the failure of an expedition in 1899. The plaintiffs loaded four steamers which they chartered and one steamer of their own with goods partly belonging to themselves and partly belonging to other persons.

“The vessels sailed from London in the middle of July, 1899; they reached the entrance to the Kara Sea and there met with ice on August 11. They unsuccessfully attempted to get through by two different routes and all sustained damage from the ice and were driven aground temporarily. On August 30 it was resolved to abandon the expedition. On August 31 one of the ships was wrecked by being rammed by a spiked mass of ice. The vessels were involved in the ice up to September 3, when they got clear and returned to London.

“The ice which they encountered was not due to the Kara Sea, being frozen up in the regular course for the winter season. The difficulties arose from the fact that at the time when the vessels reached the entrance to the Kara Sea there had, for some time, been continual northerly and northeasterly winds prevailing, and these, combined with currents from the Arctic Seas, had driven a stream of masses of ice down towards the Siberian coast.

“Upon the return of the vessels to London the

goods were landed and warehoused. The plaintiffs returned the goods belonging to other persons to their owners, and claimed, under the terms of the bills of lading, payment of the freight. Some of the plaintiffs' own goods were sold, and some were subsequently forwarded to their destination through Russia. This forwarding did not take place till June, 1900. The delay was caused [62] chiefly by there being negotiations with the Russian Government for the admission of the goods into Siberia at a reduced duty. These negotiations were abortive, and the plaintiffs had to pay, in respect of the goods forwarded, a much heavier duty than they would have paid had the goods arrived by the route originally intended. The plaintiffs claimed in the action a total loss under the policies on freight and on goods; also for a partial loss on the policies on their own goods, and for landing, warehousing, and forwarding expenses. On the claims for total loss, the learned judge held that if there had been a total loss, it was a constructive total loss, and that the plaintiffs, having given no notice of abandonment, they could not recover on those claims. The present report deals with the case only so far as it relates to the obstruction by ice and to the claim for landing, warehousing and forwarding expenses, in which the plaintiffs included the increased duty paid, as above stated.

\* \* \*

“WALTON, J., after stating the facts, continued:—The first question which has been raised is whether the obstruction to these steamers by ice in the Kara Sea was or was not a peril of the seas

within the meaning of the policies. It was said to be analogous to the closing of a port by ice in the winter and the obstruction so created to a vessel arriving at her destination at that port. In such a case the annual regular obstruction of the port by the ice in winter is in no sense an accident; it is part of the ordinary course of things, like the ebb and flow of the tides. It is scarcely necessary to say that difficulties arising merely from the ordinary closing of a port, which is subject to be closed, and is always closed, in the winter months, do not amount to a peril of the seas within the ordinary meaning of a policy of marine insurance. But that was not this case. The obstruction by ice in this case was accidental and unexpected. As far as I can understand, there had been no obstruction to the expedition in either 1897 or 1898. The unexpected prevalence of certain winds and the currents in the Arctic Seas in August, 1899, created an extraordinary difficulty and danger, for this ice was not only an obstruction, it was also a danger; one vessel was wrecked and the others were more or less damaged. The conclusion which I have come to is that the obstruction and danger and difficulty from the ice which these vessels met with was a peril of the sea, and one of the perils covered by the policies.

“(Having considered the claims for total loss of freight and of goods above referred to, his Lordship continued:—)

“With regard to the partial loss of goods, different considerations apply, because the absence of notice of abandonment does not prevent the plaintiffs from



recovering for any partial loss which they, in fact, have suffered. They claim the expenses which have been incurred for landing, warehousing, and forwarding the goods. It is said that these expenses are not recoverable, because the forwarding of the goods was not forwarding them upon the voyage [63] insured—that the voyage insured was altogether abandoned as an adventure, and that the subsequent forwarding of the goods was a mere incident in their history, and on a totally different adventure. I cannot take that view. I think that everybody knew that this voyage was one in which there might be delay. It was a voyage exposed to peculiar difficulties, and if the goods did not arrive at their destination in the Kara Sea in August or September, 1899, there might be considerable delay in forwarding them in any other way. There was delay. I need say no more about it, except this, that, in my opinion, the delay that took place does not show that the adventure of forwarding the goods was a different adventure. It seems to me that it was still the same forwarding, although by other means, though there were matters to be considered which involved considerable delay. I, therefore, think that the plaintiffs are entitled to recover in respect of any partial loss which they suffered, in consequence of the vessels being prevented from arriving at their destination by the ice in August and September of 1899. That brings me to another question, which has a direct bearing on this claim for forwarding expenses. It is whether the duty paid on forwarding can be taken into account. I think it can. I think it is one of the

forwarding expenses, and must be taken into account. It has been said that the duty is in the nature of a toll. Be that so or not, it seems to me that it is an expense which had to be incurred in order to forward the goods, and I think that it is, in any ordinary business-like sense, part of the cost of forwarding, and, therefore, must be taken into account in adjusting this claim."

Mr. Campbell then moved to strike out the foregoing, whereupon the Court asked Mr. Frank: "What pertinency do you claim for that case in the present controversy?"

Mr. FRANK.—That case in the present instance shows that the forwarding by the second vessel is part of the same venture, and it shows also that the forwarding is a loss under that policy, a direct loss by reason of a peril of the sea. One of the contentions set up in the answer is that this is not a loss by a peril of the sea. These goods were in exactly the same position. And I also will contend, when we come to submit the case, that this policy with this provision is no different with respect to this [64] matter of forwarding charges from the policy than we have under consideration. The construction of the present policy from my point of view is such as to import that it has a dual liability, one arising from it as a direct loss by peril of the sea, and a second arising by reason of the provision concerning the forwarding which by implication makes that a part of that policy.

Mr. Campbell then made the following motion:

I move the Court to strike out the testimony or the

evidence as to that case upon the ground that it is immaterial, irrelevant and incompetent because the policy there contained the express insurance clause to pay forwarding, landing and warehousing expenses, and the clause in our policy contains the following language:

“to pay any special charges for warehousing or shipping or forwarding for which they otherwise would be liable.”

One is an express insurance against forwarding charges and the other is not. The whole decision of that case is simply that the insurance company was liable for those forwarding charges under those particular policies.

The COURT.—There is more than that. Those general considerations are not based upon the particular feature of that clause at all. He is discussing what would amount to a peril of the sea. The perils of the sea insured against there, if I recollect, were substantially the same as they are here. He held that the encountering of the ice in the manner in which the opinion relates was a peril of the sea, and the injury resulted from a peril of the sea, and that the subsequent forwarding, although remotely removed from the original venture, but nevertheless a part of the original forwarding, or to be regarded as such. [65]

The Court thereupon denied the said motion to strike out the said case, to which order defendant excepted and defendant now assigns said exception to said ruling as Defendant's Exception No. 5.

Mr. Frank then offered and read in evidence the

case of Popham and Willett v. The St. Petersburg Ins. Co., 10 Commercial Cases, 276, as follows:

“The plaintiffs were time-charterers, and for the purposes of the case were treated as owners of the steamship ‘Buccaneer.’ They employed her for the purpose of carrying goods from London to Siberia by the Kara Sea. Amongst the goods carried was machinery belonging to the plaintiffs themselves and certain resin and rice belonging to Mr. J. Singer. Insurances were effected in respect of these goods by three separate marine policies as appears in the head-note. Each of the policies contained the ordinary suing and labouring clause and also a clause in the following words:

“ ‘To pay landing, warehousing, and forwarding charges, should the same be incurred, as well as partial loss arising from transshipment and reshipment.’

“The vessel encountered unusual obstruction and danger from ice in the Kara Sea, and being unable to proceed to her destination, abandoned the voyage and returned to London, where her cargo was discharged. Considerable expense was incurred in landing and warehousing the goods and in forwarding them to their destination.

“By a judgment delivered in the action by Walton, J., the plaintiffs were held entitled to recover certain landing, warehousing, and forwarding expenses, and in adjusting the amounts so recoverable, questions arose which now came before the Court for argument.

“In respect of the expense amounting to £2025 of



forwarding the plaintiffs' machinery they claimed under the freight policy up to the insured value of the freight, namely, £1228, and under the goods policy they claimed to recover £1126, namely, the total expense of forwarding, less £899, which was the actual value of their interest in the nature of freight in respect of the goods. The claim under these two policies, therefore, exceeded the actual amount expended in forwarding.

“Under the policy on Singer's goods the plaintiffs (on behalf of Singer) claimed to recover the expense incurred in forwarding the goods without making any deduction for the bill of lading freight. The defendants denied that the bill of lading freight had been paid, and contended that it should be deducted.

“Such other facts and figures as are material may be gathered from the headnote and judgment. [66]

“WALTON, J.—I decided, by my judgment, delivered on November 8, 1904, that the plaintiffs could not recover for a total loss, and since that judgment the claim upon a different footing, namely, for landing, warehousing, and forwarding expenses, has been adjusted. Some objections have been raised to the adjusted claim with which I have now to deal. One of the matters in dispute is the claim in respect of forwarding 96 packages of machinery, which were shipped by the plaintiffs themselves. In respect of these goods, they were in the position of ship owners carrying their own goods in their own ship. They insured the goods, and by a separate policy they insured, under the name of ‘freight,’ as they might do, the profit derivable by them from the employment of

their ship to carry their own goods. This interest, called, as I have said, 'freight' in the policy, was valued at £1228, 2s, 10d. When, in consequence of the difficulties encountered in the Kara Sea, the goods were brought back to London, they were forwarded to their destination at a cost amounting to £2025. In the way in which the claim is made up the plaintiffs claim in respect of the 'freight' policy their forwarding expenses up to the full amount at which the 'freight' is valued in the policy, that is £1228. Under the policy on goods they claim an amount of £1126 arrived at by deducting from the £2025 not the £1228 claimed under the freight policy, but a sum of £899, which they say was the actual value of their interest in the nature of freight; this gives a balance of £1126. In this way the plaintiffs seek to recover altogether in respect of these expenses not the actual sum incurred, £2025 is 4d, but a larger amount, namely, £1228, plus £1126, which comes to £2354. This seems to me to be wrong.

"The defendants further contended that the plaintiffs were not entitled to recover the whole £2025; that they could only recover either under one policy, or that if the plaintiffs recovered £1228 under the freight policy, they could not recover under the goods policy more than the balance of the £2025 after deducting both the £1228 and the £899, the actual value of the freight, on the ground that such freight must be treated as not payable or paid, and so saved to the goods owner. I think that these contentions cannot be supported. A loss in either interest was averted by the expenditure of £2025; both interests were

saved. The actual expenditure must be borne between them, but the assured cannot recover for forwarding expenses more than the sum actually expended. The precise mode of apportionment in the present case is unimportant, since the assured and the insurers under each of the policies are the same. I think, therefore, that the plaintiffs are entitled to recover £2025 under the two policies.

“There was another claim in respect of 600 bags of resin and 400 bags of rice. These were goods belonging to one, Singer, which were insured by the plaintiffs, [67] and which were forwarded to their destination in Siberia at a very heavy expense. There is a claim for these forwarding expenses. Part of the freight in these goods was paid by Singer to the plaintiffs, but there was a balance of £288 which was not paid. In making the claim for forwarding expenses in respect of these goods no deduction is made for freight. In the adjustment there is this note, ‘the original freight at risk not deducted as to be considered earned in London.’ The objection is made that the defendants require proof that the plaintiffs received freight on these goods on their return to London. On behalf of the plaintiffs it is pointed out that this freight was, by the terms of the bills of lading, payable when the goods were returned to London after the failure of the expedition, whether the goods were forwarded or not. It seems to me that the reason for deducting the freight from the forwarding expenses in the case of a claim of this kind is that the freight is saved to the goods owner by the expenditure in respect of which the claim is

made. That is to say, if the owner of the goods, when the ship cannot carry them on, carries or has them carried at his own expense, he gets them to their destination, but as the ship has not carried them, he ordinarily is not liable for the bill of lading freight, and therefore the freight is deducted so as to get at his actual net expenses in forwarding. Where, however, the freight is paid in advance, that is a plain case in which the freight is not saved, and the assured would be entitled to the forwarding expenses without a deduction for freight. Now, in this case the freight was not paid in advance, but by bills of lading it was payable in London, and payable whether the goods were forwarded or not. It seems to me, therefore, that the assured are entitled to recover these forwarding expenses, and are not bound to give credit for that which they have not saved, namely, the amount of the freight. Whether the freight has or has not been actually paid makes in this case no difference.”

Thereupon the defendant made the following motion:

Mr. CAMPBELL.—I move to strike out the evidence in that case, if the Court please, upon the same grounds as to the preceding case; that the policy under which that recovery was had was different entirely in terms from the present policy. That was an express insurance against forwarding charges, whereas in this case it is not.

“The Court thereupon denied defendant’s said motion, to which order defendant duly excepted and defendant now assigns said exception to said ruling



as Defendant's Exception No. 6. [68]

Mr. Frank then offered and read in evidence the case of *Booth v. Gair*, 15 Com. Bench. Reps. (N. S.), 290, and stated that the purpose of the offer of said evidence was to prove the custom and practice of the underwriters with respect to such charges. That it has been the custom and the practice of the underwriters in England to pay charges of this nature, under an ordinary policy against the perils of the sea.

Mr. Frank then made a general statement of the facts of that case material for the purposes of this trial, as follows:

That was a policy of insurance on bacon. The policy contained a sue and labor clause, and it also had the warranty free from average unless general, whether the ship be sunk, stranded or burned. She sailed from New York and met heavy gales, strained and leaked and finally bore away for a port of refuge where she came to anchor; her cargo was discharged, and upon an examination of the ship she was found so badly damaged that she could only be repaired at Bermuda at an expense exceeding her value when repaired, and she was accordingly condemned and sold. Surveys were held on the cargo to determine what should be sent on and what should be sold. Part of it was sold. And the remainder, including the remainder of the bacon, was transshipped on two vessels to Liverpool. The expense of transshipment and the freight exceeded the freight originally agreed to be paid. There were some warehousing expenses. It was admitted that there was no con-

structive total loss of the bacon, and that plaintiff sought to recover from defendant under said policy the difference between the amount of freight to be paid the first vessel and the sum total of the freight paid the other two vessels on the shipping charges, and also a portion of three other [69] items of expense incurred by reason of the vessel putting into Bermuda and the transshipment of the cargo. It was also admitted that down to the date of the policy involved herein, it was the custom of the underwriters to pay charges on cargo as to any of the items the subject-matter of this case except cooperage, under the name of particular charges.

Mr. Frank then read the following part of the statement of facts from the case:

“10. It was also admitted that, down to the date of the policy in this case, it was the custom of underwriters to pay charges on cargo of the nature of the items the subject of this case, except cooperage, under policies in the form of the policy in this case, under the name of ‘particular charges.’ ”

The judgment of the court in said matter is as follows:

“Erle, C. J., now delivered the judgment of the court:

“This was an action on a policy from New York to Liverpool on a cargo of bacon, containing the clause, ‘warranted free from average, unless general, or the ship be stranded, sunk, or burnt,’ and other usual terms.

“In the course of the voyage there was a constructive total loss of the ship; but the cargo was landed

and warehoused. A part was found worthless, but the residue was sent on in common course, and arrived safe. The plaintiff claimed from the underwriter the expenses incidental to this transshipment of the cargo. The underwriter contends that he is freed by the warranty from these expenses. And although he admitted that the law must be taken, for the purpose of this argument, to have been correctly laid down in the case of *The Great Indian Peninsular Railway Company v. Saunders*, 1 Best & Smith, 41 (E. C. L. R. vol. 101), 2 Best & Smith, 266 (E. C. L. R. vol. 110); and although, under the circumstances of that case, the warranty exempted the underwriter from liability, and the clause authorizing the assured to sue and labour for the safeguard of the cargo did not make him liable; yet the learned counsel for the plaintiff has contended that the circumstances of this case made a distinction, and gave the assured a right to recover under the last-mentioned clause.

“But we are unable to find any substantial distinction between the two cases. There, the goods (iron) were returned to the assured at the port of loading in [70] an undamaged state, and sent on by them. Here, they were perishable goods, landed at a port on the voyage in a damaged state, and sent on by the master. What the master did in this case was in discharge of his duty in ordinary course; and there was no peril creating a risk of a total loss from which the underwriter was saved by the expenses in question. There were no other perils than such as

are always attendant on the transit of goods by the voyage in question.

“If the assured intended to confine the warranty to a partial loss from damage to the cargo, and to have the liability of the underwriter for expenses of transshipment, in our opinion this policy does not express that intention. Judgment for the defendant.”

Mr. Frank then offered and read in evidence the case of *Kidston and Others v. The Empire Marine Insurance Company, Limited*, 1 Com. Pleas L. R. 535; 14 Eng. Ruling Cases, 247.

Mr. FRANK.—This case is principally offered at this time on the question of this practice and also because of the distinction it makes of the cases of the *Great Indian Peninsular Railroad Company v. Saunders and Booth v. Gair*, with respect to the underwriters being free under the particular average warranty from expenses of that nature.

“This was an action to recover 1145£ 3s. 6d. upon a policy of insurance effected in the sum of 2000£ by the plaintiffs, with the *Empire Marine Insurance Company*, on charter freight, valued at 5000£.

“The declaration contained a count on the policy, and the common money counts. The only material claims in the declaration were: first, a claim of the 2000£ insured, on the ground of the total loss of the charter freight; secondly, a claim under the suing and laboring clause of the policy, for the charges and expenses incurred by the plaintiffs by reason of the plaintiffs, their factors, servants, and assigns, suing,



labouring, and travelling in and about the defense, safeguard, and recovery of the subject-matter of the insurance,—thirdly, a claim for money paid to the defendants' use.

“The defendants pleaded to the first claim that the ship was not stranded, sunk, or burnt, and that the loss [71] was a particular average loss; to the second claim—first, that the charges and expenses so incurred as aforesaid constituted and were only particular average losses, from which the subject-matter of the insurance was warranted free,—secondly, that a loss or misfortune did not arise within the true intent and meaning of the policy,—thirdly, that there was no suing, labouring, or travelling in and about the defense, safeguard, and recovery of the subject-matter of the insurance, within the true intent and meaning of the policy. To the common counts, never indebted.

“The plaintiffs joined issue on the several pleas, and also demurred to the plea which set up that the charges were particular average losses.

“The cause was tried before Erle, C. J., at the London sittings after Michaelmas Term last, when it appeared that the plaintiffs' shipowners at Glasgow, were owners of the ship SEBASTOPOL; and the defendants were an insurance company carrying on business at Liverpool.

“On the 16th of March, 1863, the plaintiffs chartered the SEBASTOPOL to Messrs. Thomson & Co., by a charter-party, according to the provisions of which the ship was to proceed to the Chincha Is-

lands, there to load a cargo of guano, and thence to proceed therewith to the United Kingdom, for the stipulated freight 75s. sterling in full per ton of 20 cwt. net weight of guano at the Queen's beam; such freight to be paid as follows, viz.: 1,000£ in cash on arrival at port of discharge, three months' interest at the rate of 5 per cent being deducted, and the balance forty-eight hours after the true and right delivery of the whole cargo.

"On the 18th of August, 1863, the plaintiffs effected with the defendants the policy in question, being a policy of insurance in the sum of 2000£ by the SEBASTOPOL on charter freight valued at 5000£, warranted free from particular average, also from jettison, unless the ship were stranded, sunk, or burnt; the voyage insured by the said policy covering the aforesaid chartered voyage to the Chincha Islands and thence to the United Kingdom. The policy also contained the usual suing and labouring clause.

"The SEBASTOPOL sailed for the Chincha Islands, and there loaded a cargo of guano, with which she sailed for Cork; but, in the course of the voyage, she was compelled by stress of weather to put into Rio Janeiro, where she arrived on the 7th of February, 1864.

"On her arrival at Rio, the cargo of guano was discharged and properly stored and warehoused; and on being surveyed, she was found to have been so damaged by the perils of the seas as not to be worth repairing. She was therefore sold by the master at Rio on the 31st of March, 1864; the sale being in

all respects proper and necessary, and the ship herself being then a total loss. [72]

“On the 12th of March, 1864, the master of the SEBASTOPOL chartered the ship CAPRICE, at a freight of 37s. 6d. per ton, for the purpose of bringing the cargo of guano from Rio to the United Kingdom, and delivering it to its owners. The charter-party was made at Rio, and purported to be made between E. S. Harkey, master of the CAPRICE, and Duncan Taylor (on behalf of owners), master of the SEBASTOPOL, and was signed E. S. Harkey and Duncan Taylor. The cargo was accordingly taken from the warehouses where it had been stored and warehoused at Rio, and loaded on board the CAPRICE, and conveyed by that ship to Bristol, and there duly delivered to Messrs. Thomson & Co. the owners of the cargo. The plaintiffs paid to the owners of the CAPRICE 2467£ 11s. 10d., which was the agreed freight payable to that vessel for carrying the cargo from Rio to Bristol.

“Messrs. Thomson & Co., on delivery of the cargo, paid the charter freight 5000£ in full to the plaintiffs, who did not pay the same or any part thereof to the defendant.

“The plaintiffs did not give any notice of abandonment to the defendants.

“The expenses incurred at Rio in discharging, warehousing, and transshipping the goods, together with the freight, payable to the CAPRICE, amounted to about 3000£

“For the plaintiffs it was contended that they were entitled to recover from the underwriters the

expenses incurred in conveying the guano to the CAPRICE from the warehouses at Rio, which were less than 100£, and also the sum of 2467£, 11s. 10d., paid by the plaintiffs to the owners of the CAPRICE for carrying the cargo from Rio to the United Kingdom.

“For the defendants it was contended that they were not liable on the policy to repay to the plaintiffs any part of the said expenses, nor any part of the 2467£ 11s. 10d.

“At the trial several average-adjusters and other witnesses were called to prove the meaning of the term ‘particular average’ in the business of marine insurance; and the jury found that, up to the time of the policy in question there had been in the business of marine insurance a well-known and definite meaning affixed by long usage between the assured and the underwriter to the term ‘particular average,’ as contra-distinguished from the term ‘particular charges,’ in the manner described by the witnesses, viz.: that ‘particular average’ denotes actual damage done to or loss of part of the subject-matter of insurance, but that it does not include any expenses or charges incurred in recovering or preserving the subject-matter of insurance; and that expenses incurred in warehousing and forwarding are not ‘particular average,’ but are termed ‘particular charges.’ [73]

“Upon this finding of the jury, a verdict was entered for the plaintiffs, leave being reserved to the defendants to move to enter a verdict for them, or a nonsuit.



“MELLISH, Q. C., in Hilary Term last, obtained a rule pursuant to the leave reserved, on the grounds,—first, that the charges in question were not within the clause in the policy respecting suing and labouring, and that no other part of the policy was applicable to the case,—secondly, that the custom alleged was a universal custom, and not a custom of any particular place or trade,—thirdly, that there was no evidence that the alleged custom prevailed in Liverpool at the time the policy was made. \* \* \*

“WILLES, J. This was an action upon a policy of insurance for 2000£ from South America to the United Kingdom. The vessel procured a charter from the Chincha Islands to the United Kingdom, loaded a cargo of guano there, and on going round Cape Horn suffered damage so serious that she had to put into Rio, where she was abandoned, and, it must be taken for the purposes of this case, was totally lost. The cargo, however, was transshipped into another vessel and sent home, and the chartered freight, or an amount equivalent to the chartered freight, according to the construction to be put on the matter, exceeded the expense of transshipment, and the freight from Rio to Liverpool was received by the assured. The action was brought by the assured to recover the expenses of transshipment and forwarding.

“At the trial, evidence was given to show that the warranty in the policy on which the question turned was not considered applicable to the circumstances. The warranty was, ‘free from particular average; also from jettison, unless the ship be

stranded, sunk, or burned,' neither of which happened.

"The evidence given was for the purpose of showing that the charges of transshipping and forwarding had been considered to be what was called technically 'particular charges,' and not particular average so as to be within the warranty. The verdict passed for the plaintiff's affirming the existence of the usage at the time when the policy was made, subject to leave reserved to the defendants to move to enter a verdict, which they accordingly did; and that rule was discussed last term before the Chief Justice and my Brothers Keating, Montague Smith, and myself, when we took time to consider. At the sittings after term we discharged the rule, not stating our reasons, but promising to do so during this term; and that promise I am now about to fulfill.

"Many points were made upon the argument of this rule; upon one of which only is it necessary to pronounce an opinion. That turned upon the construction of the suing and labouring clause in the policy; and it may be considered under the following heads,—first, whether the [74] expenses incurred were of a character to be within the clause,—secondly, whether the occasion upon which they were incurred were such as to be within it,—thirdly, whether if it was such, the application of the clause is excluded by the warranty against particular average.

"As to the first question, it was hardly disputed that the expenses incurred were of a character to be within the clause. Without incurring them the

subject-matter of the insurance never would have had any complete existence. They were incurred in order to earn it; and they represented so much labour beyond and besides the ordinary labour of the voyage, rendered necessary for the salvation of the subject matter of insurance, by reason of a damage and loss within the scope of the policy, the immediate effect of which was that the subject matter insured would also be lost, or rather would never come into existence, unless such labour was bestowed. As the goods lay at Rio, no part of the chartered freight had accrued due, and no freight even *pro rata itineris* could have been claimed by the shipowner. His only right in respect of the charter freight was to detain the goods for a reasonable time in order to send them on in another vessel to their destination, and there claim an amount equal to that of the charter freight. In order to do so, labour must be used and expense incurred. It can make no difference whether the shipowner happened to have at the port of distress a vessel of his own which he can employ in this service, in which case the labour of forwarding would be strictly that of himself or his servants, or whether he forwards in the vessel of another shipowner, paying for his labour and that of his servants. Nor can it make any difference, in the application of the clause, whether, as here, the goods are in a port of large resort, or where by reason of the rate of freight a forwarding vessel is easily procured, or whether the vessel becomes a wreck in an out-of-the-way place, and by unusual enterprise and skill

the master is enabled to communicate with a vessel either of his owner or of some other person by which he forwards the cargo to its destination. The amount of labour is different in degree in the two cases; but in each it is a consequence of a peril insured against it; it is incurred in preventing the destruction of nonentity of the subject-matter for which in the event of its loss the underwriters must be answerable. There is in each case a loss or misfortune threatening the safety of the subject-matter of the insurance, and by the operation of which, unless averted by labour, that subject matter will be imperilled and the underwriters may become liable.

“As to the second head,—whether the occasion upon which the expenses were incurred was such as to be within the suing and labouring clause,—this depends [75] upon the true answer to the question so thoroughly discussed in the course of the argument, viz.: whether the clause ought to be limited in construction to a case whether the assured abandons, or may perchance abandon, so that the expense incurred is not only in respect of a subject matter in which the underwriters are interested, but upon property which, by the abandonment, actually becomes, or may become, theirs, or whether it extends to every case in which the subject of insurance is exposed to loss or damage for the consequences of which the underwriters would be answerable, and in warding off which labour is expended. In the former construction the clause is inapplicable to the present case; in the latter it is applicable, and the assured is entitled to contribution.



“The question manifestly depends upon the construction of the language of the clause; and, quite apart from the proved usage, we think the latter is the true construction. The words of the ordinary suing and labouring clause (to which in this policy is superadded an express provision as to abandonment upon which we need only say in passing that it does not alter the question in favour of the underwriters) are used in the same form as must have been in common use before 1783, when Emerigon published his great work on insurance, in which amongst the various forms of the clause used at different ports, that of the London policy then used is given. (Emerigon, by Boulay-Paty, vol. ii, p. 239.) The words are quite general, and ought to be so construed unless some good reason is given for restraining them,—that, ‘in case of any loss or misfortune, it shall be lawful’ to ‘sue, labour, and travel for, in and about the defense, *safeguard*, and recovery of the subject-matter,’ ‘without prejudice to this *insurance*’ (not abandonment, as in the French Ordonnance hereafter cited), ‘the charges whereof the said company will bear,’ ‘in proportion to the sum hereby insured’ (not the amount saved, as in the French Ordonnance). Up to this point, there is not a word about abandonment; and this is the whole of the usual clause. The meaning is obvious, that, if an occasion should occur in which by reason of a peril insured against unusual labour and expense are rendered necessary to prevent a loss for which the underwriters would be answerable, and such labour and expense is incurred accordingly, the underwri-

ters will contribute, not as part of the sum insured in case of loss or damage, because it may be that a loss or damage for which they would be liable is averted by the labour bestowed, but as a contribution on their part as persons who have avoided detriment by the result in proportion to what they would have had to pay if such detriment had come to a head for want of timely care. Take, for instance, the case of a policy on goods warranted free of average under 5 per cent and the goods are wetted in a storm which drives the ship into a port of distress, where by drying at an expense less than 5 per cent the goods might be saved or damaged [76] under 5 per cent, whilst, if not dried, they would decay and become damaged over 5 per cent, though existing in specie, so that freight would be payable. In this case there is no abandonment, and may be no prospect of one; and yet it is the duty of the master to use all reasonable means to preserve the goods, and obviously for the interest of the underwriters to encourage him in the performance of that duty by contributing to the expense incurred. Not only the generality of the words, but also the subject matter to which they relate, therefore, point to the application of the clause to all cases in which the underwriter is saved from liability to loss, whether partial or total, and whether an abandonment does or may possibly take place or not.

“There remains to be considered, thirdly, whether the application of the suing and labouring clause is excluded in this particular case by the warranty against particular average,—‘warranted free from

particular average, also from jettison, unless the ship be stranded, sunk, or burnt.' And this depends upon whether the expression 'particular average' in this context, and construed, according to the golden rule, by what goes before and follows in the policy, includes expenses which fall within the suing and labouring clause, so that in effect the suing and labouring clause is expunged by the warranty.

"This is a question the answer to which involves most important consequences, because, if the warranty against particular average, or, to use a more accurate expression with the same meaning, the warranty against total loss only, excludes the operation of the suing and labouring clause even where an impending total loss is averted by extraordinary exertion and expense, it must be because the word 'average' has some fixed and definite meaning so rigid and inelastic that it cannot be modified or limited so as to apply to loss of or damage to the thing insured (the sense in which it has been hitherto understood by average-staters); but that it must needs also include contribution to any labour incurred in the defense and safeguard of the thing insured, so that even an express clause left standing in the policy with reference to such labour, the suing and labouring clause) must be rejected as inconsistent with the warranty. If this be so, it must equally be true of all memorandum goods which are warranted free from average under a certain percentage; and the operation of this would be so general, if not universal, that the suing and labouring clause would be confined to the cases excepted in the memoran-



dum alone. Two results would follow, both novel in practice, and one at least very remarkable.

“The first would be unfavorable to the underwriters in a novel way, because the memorandum was framed to protect the underwriters from frivolous demands in respect of small losses which are most likely to have arisen from natural deterioration or wear and tear. The exception of [77] stranding tends to show that this was the scope of the memorandum; for, it is the exception of such a loss as makes it probable that the deterioration of the goods, though under the given percentage, was nevertheless not to be attributed to the perishable nature of the goods themselves. Accordingly, the rule has been, to pay for damage to memorandum articles only where it exceeded the specified percentage, and not to allow this percentage to be eked out by expenses falling within the suing and labouring clause. Thus, in the case already out, of goods wetted by a storm, the amount of expenses reasonably incurred in preserving the goods is, according to the present practice, contributed to under the suing and labouring clause, however small in the result be the loss or damage to the goods; and the loss of or damage to the goods is paid if it amount to the stipulated percentage, but not otherwise; and the amount of expenses is not added in order to make up that percentage. Thus, if the agreed percentage be 5 per cent and the expenses amount to 2 per cent, and the loss or damage to 3 per cent, only the expenses are paid, and not the average. But, if we hold that the warranty excludes the application of the suing and



labouring clause, the whole must be paid, and the underwriters will be exposed to the very inconvenience which the memorandum has been supposed to obviate.

“Upon the other hand, if the expenses should be less than the percentage, and a loss is thereby prevented either altogether or to an extent less than the percentage; as, if, in the case put, the expenses were 3 per cent and the damage only 1 per cent, according to the present practice the underwriters would pay the expenses; but, if we decide for the present defendants, the underwriters, though saved from loss, would be altogether exempt from contribution.

“In our view, however, we are not compelled to adopt so inconvenient and unpractical a conclusion. The word ‘average,’ so far from being a term of art (except in so far as according to the evidence usage may have limited its meaning to loss or damage to the goods themselves), or a word with a rigid or unchanging signification necessarily including expenses in the defense or safeguard of the subject-matter insured, is a word used in a great variety of phrases as applicable to different subjects-matters, and not with any fixed or settled application. It would be tedious to go through the various uses to which it is applied; and we need not do more than refer to the instances cited in argument, and more especially to the very learned note of Mr. Mac-lachlan in Arnould on Insurance (1). Amongst the

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(1) 3d ed., vol. ii, p. 739.

various uses to which the word has been applied, no doubt, that of 'small [78] expenses' is one, as in the usual clause in a charter-party. So, in the case of insurance itself, expenses must often be taken into account in determining whether there has been a loss or not, but only because a thing is lost in insurance law which cannot be got back except at an expense equal to its value when recovered.

“The question here, however, is not as to the extension of which the term ‘average’ is capable, but of the sense in which it ought to be understood in the particular context with which it is to be reconciled, and if possible read so that effect may be given to every provision in the instrument. Nor is it to be forgotten that the suing and laboring clause, which for the reasons already given specifically provides for this case, has been allowed to remain a part of the policy; and that a special provision as to a particular subject matter is to be preferred to general language, which might have governed in the absence of such special provision. *‘Generalia specialibus non derogant.’ ‘Specialia generalibus derogant.’*”

“In our opinion, quite apart from usage, the true construction of the policy, as reconciling and giving effect to all its provisions, is, that the warranty against particular average, does no more than limit the insurance to total loss of the freight by the perils insured against, without reference to extraordinary labour or expense which may be incurred by the assured in preserving the freight from loss, or rather from never becoming due, by reason of the operation of perils insured against; and that the latter ex-

penses are specially provided for by the suing and labouring clause, and may be recovered thereunder.

“Much reliance was placed, for the defendants, upon two recent decisions which are said to have determined that there could be no liability under the suing and labouring clause where there was none under the policy; *The Great Indian Peninsular Railway Company v. Saunders*, and *Booth v. Gair*, the first of which cases was decided before and the other after the date of the present policy.

“Before these decisions, the liability of the underwriters appears to have been universally admitted and acted upon even in the cases where the expenses were incurred to forward goods existing in specie at the port of distress, and warranted free from particular average, so that no liability could accrue to the underwriters by their not being forwarded.

“Probably the underwriters, up to the time of the first of these decisions, thought it so important to encourage honest efforts to preserve and forward the cargo, or otherwise to preserve the subject-matter of insurance, that they preferred paying in all unsuspecting cases, without nice inquiries as to whether the expenses had in particular instance averted liability. In so doing, they not only acted with liberality, but no doubt also best studied their own interests; and, whilst they calculated [79] the premium so as to include a remuneration for the extra liability which they were satisfied to bear, they probably at the same time found that the encouragement to fair dealing thereby afforded was their best

security against the more serious losses that might arise from neglect of precautions of which the expense was thrown upon the assured.

“This practice, however, could not prevail to alter or enlarge the application of the suing and labouring clause; because, though usage may impose a meaning upon a word such as ‘average,’ it cannot alter the rules of construction; and, in the cases referred to, the decision and the sole decision was, that freight and other expenses of forwarding from a port of distress to the port of destination goods warranted free of particular average, under circumstances under which the underwriters could not have been liable if the expenses were not incurred, was not within the true intent and meaning of the suing and labouring clause, which in the context of a policy of insurance could only extend to suing and labouring by means of which the underwriters might obtain a benefit.

“In the *Great Indian Peninsular Railway Company v. Saunders*, the goods were iron rails for Bombay, shipped to be paid for lost or not lost. They were insured with a warranty ‘free of particular average unless the ship should be stranded, sunk, or burnt.’ The vessel on her way put into Plymouth, where she was a total loss; but she was not ‘stranded, sunk, or burnt.’ The rails were saved and sent on by other vessels, and for the freight paid upon such forwarding the underwriters were held not to be liable; and Blackburn, J., in delivering the judgment of the Court, carefully abstained from deciding the question now before us; for, he said: ‘It is not neces-



sary to decide whether an underwriter on a policy against total loss only, is, under this clause, liable for expenses incurred by the assured for the purpose of rescuing the subject-matter of an insurance from a state of peril which might have resulted in a total loss, but did not. There are reasons both for and against this stated by Mr. Phillips in his *Treatise on Insurance*; and the question seems never to have been actually decided. But in the present case it does not arise. The expenses here were incurred for the purpose of forwarding the subject-matter of insurance to its destination at a time when the iron was not in any peril of total loss, either actual or constructive. Had the insured chosen, instead of paying this extra freight, to sell the rails in England, as he might have done if he pleased, he could have made no claim on the underwriters; for, it would not have been a constructive total loss, according to *Rosetto v. Gurney*, unless the amount of the extra freight exceeded [80] the value of the goods when forwarded, which is not the case here; and an actual total loss is out of the question.' That judgment was affirmed in the Exchequer Chamber, where Erle, C. J., in like manner, delivering the judgment of the Court, said: 'The expenses that can be recovered under the suing, labouring, and traveling clause are expenses incurred to prevent impending loss within the meaning of the policy. Now, here, the goods were given up to the plaintiffs in perfect safety; and the question is, were those expenses incurred to prevent a total loss? Had the owners a right, when the goods were given into their

possession, to turn the transaction into a total loss? Certainly not; for, they had their goods in specie, and consequently that £825, 11s. 7d. had no reference to suing, labouring, or travelling to prevent such a loss.'

"That case was followed by *Booth v. Gair*, in which bacon was insured upon a voyage from Liverpool to New York, "free from average unless general or the ship were stranded, sunk, or burnt.' The vessel, on her way, by perils of the sea, but without being stranded, sunk, or burnt, became disabled, and put into Bermuda, where she was constructively totally lost. The bacon was landed in specie, and was not totally lost, constructively or otherwise. No expenses appear to have been incurred in saving the goods from a total loss, which was negatived; but certain expenses were incurred in the way of extra freight, transshipment, warehousing, surveying, and cooperage, all of which were treated as expenses of forwarding the goods. It was further proved that it was the practice of underwriters on goods to pay such expenses under like circumstances, under the name of particular charges. The judgment was for the underwriters, upon the ground stated by Erle, C. J., viz., that 'what the master did was in discharge of his duty in ordinary course, and there was no peril creating a risk of a total loss from which the underwriter was saved by the expenses in question. There were no other perils than such as are always attendant on the transit of goods by the voyage in question.' No notice appears to have been taken of the practice of underwriters, probably for the rea-

son already mentioned, that, although usage may give to the words 'average,' 'particular average,' or 'average unless general,' a conventional meaning, so as to make them include partial loss or damage of the subject-matter only, and not what are known as 'particular charges,' which fall within the suing and labouring clause, yet such usage could not control the construction of the policy, by which that clause must be limited in application to cases in which the underwriter might incur liability, and therefore might derive a benefit from the extraordinary exertion. That is the circumstance which distinguishes these cases from the present,—that the usage of underwriters already brought to the attention of the Court in *Booth v. Gair* could not affect the decision in that case. These decisions, therefore, are inapplicable to the present case, and, when examined, prove to be anything but authority for the defendants. [81]

"Passages from Emerigon were cited by the defendants' counsel, and much relied upon, in which a contrary opinion is supposed to have been expressed to that upon which we found our judgment. In chapter 12, s. 41, vol. i., p. 600, Boulay-Paty's edition, treating of general and particular average as between the owner of ship, freight, and goods, he says: '*Les frais faits pour sauver la marchandise sont avaries simples pour le compte des propriétaires.*' He is not there giving an opinion upon the construction of the policy. He refers, however, to the 17th chapter, s. 7, for a discussion of the question of liability as between the insurers and the assured,

either with or without a suing and labouring clause; and in that, which is the part of the work applicable to the present subject, he throughout treats the question as depending upon the very words of the suing and labouring clause.

“Nothing can make this more clear than a reference to his treatment of the question: ‘Si les frais de sauvetage excédant la valeur des effets sauvés, cet excédant est il a la charge des assureurs?’ To which he answers: ‘Suivant les clauses insérées dans les formules de diverses places de commerce, les assureurs, indépendamment des sommes par eux assurées, sont tenus de payer l’excédant des frais de sauvetage’—Vol. ii., p. 238. He then sets out the forms of the suing and laboring clauses used at Antwerp, Rouen, Nantes, and Bordeaux; and he refers to a similar and more ancient one to be found in Loccenius, p. 981, by which the underwriters undertake for expenses incurred in the safeguard of the goods, even though no benefit should follow: and he remarks thereupon: ‘Par ces formules les pouvoirs les plus libres sont données a l’assuré et a ses représentants, afin de les inviter a travailler au sauvetage, sans être arrêtés par la crainte d’en supporter eux-mêmes les frais; mais les assureurs, en souscrivant pareils pactes, contractent a l’aveugle un engagement dont les conséquences sont indéfinies.’

“He then gives the London form of suing and labouring clause as then and still used; and he proceeds to say that the Marseilles policy (with which he was so familiar) contained nothing of the sort, and that an express authority to sue and labour was



necessary in order to charge the Marseilles underwriters with the expenses.

“This view, so far as it bears upon the present argument, is in accordance with the view of the London average-staters, and favours a distinction between loss and damage to the thing assured, and expenses incurred in its protection, and a separate provision for the latter.

“In fact, the key to the French authorities is to be found in the positive law of France upon the subject, by which, in the absence of express contract, contribution on the part of the underwriters was enforced in the cases of the greater perils of shipwreck or stranding, and then only to the value of the property saved for the underwriters. [82] Thus, by the Ordonnance de la Marine of 1681 (Liv. iii., tit. 6, art. 45),—‘En cas de naufrage ou echouement, l’assure pourra travailler au recouvrement des effets naufrages, sans prejudice des delaissements qu’il pourra faire en temps et lieu, at du remboursement de ses frais dont il sera cru sur son affirmation jusqu’a concurrence de la valeur *des effets recouvres*.’ This is followed closely, though not exactly, by the Code de Commerce, art. 381, with the difference that the latter, by using the word ‘doit’ instead of ‘pourra,’ makes such exertions the duty, and not merely the privilege, of the assured.

“Read by the light of this text of the Ordonnance, the views of Emerigon, so far from being opposed to, are in favour of the construction which we adopt.

“Hitherto we have only adverted in passing to the evidence and the finding of the jury upon the under-

stood meaning in the business of marine insurance of the phrase 'particular average.' If necessary, we should have been prepared to hold that the evidence established such an understood meaning, according to which 'particular average' does not include 'particular charges,' and to act upon such usage as equally sacred with the express part of the contract.

"It is needless, however, to enlarge upon this part of the case, because, upon the facts proved, and the true construction of the policy itself, we have, for the reasons already given, come to the conclusion that there was a danger of the total loss of the freight by reason of the loss of the ship by perils insured against; that the measures taken by the plaintiff to avert that loss, and the expense incurred therein, were taken and incurred for the benefit of the underwriters, in averting a loss for which they would have been liable; and so that they were within the suing and labouring clause, and that the underwriters are liable to contribute thereto. It is satisfactory, however, to think, that, in arriving at this conclusion upon the meaning of the contract into which the defendants have entered, we are deciding also in accordance with the approved usage of commerce.

"The verdict for the plaintiffs was therefore right, and the rule to enter the verdict for the defendants is discharged."

Mr. FRANK.—Along that same line, and as proof of the usage, I call attention now to the case of Bid-

dell Bros. v. Clemens Horst Co., 16 Commercial Cases, and what I am going to read is on pages 202 and 203. That case dealt with the necessary proof of a custom or usage. There the court had imported into the case a custom or a usage, or taken judicial notice of it, and this is upon [83] that subject, and incidentally shows how the custom or usage is to be proven. \* \* \* This is the point of it, that the English Court holds that when a custom or a practice has once been proved in a court of law, it then, by virtue of that proof, becomes a part of the mercantile law of that country. That is the point, and that is the reason I am calling attention to this.

Mr. CAMPBELL.—I don't dispute that proposition.

Mr. FRANK.—You do not. Then I will stop on that right here. That is admitted. \* \* \* I think I will read just one paragraph and with that admission we will let the rest of it go.

Mr. Frank then read as follows:

“When it is said that mercantile law is acted upon by the courts without proof of usage, this means after it has in earlier cases been proved and adopted.

“I am not forgetting that in some cases classic legal authorities have been recognized as sufficient evidence of mercantile usage, especially international usage. But even then the authority is in terms recognized as sufficient evidence before the Courts give judgment recognizing the usage; but no such evidence was referred to in this case. It seems clear on the authorities that the law merchant must

be proved as a fact in the sense that the mercantile usage which is recognized as part of the law merchant must be proved, and the fact must, to use the words of Wilmot, J., in *Edie v. East India Co.*, be reiterated. Once thus recognized the usage becomes part of the law of England and not a mere local usage or custom. Again, Lord Campbell in the House of Lords, in *Brandao v. Barnett* says: 'When a general usage has been judicially ascertained and established, it becomes a part of the law merchant which Courts of Justice are bound to know and recognize. Such has been the invariable understanding and practice in Westminster Hall for a great many years; there is no decision or dictum to the contrary, and justice could not be administered if evidence were required to be given *toties quoties* to support such usages, and issue might be joined upon them in each particular case.'

Whereupon, the plaintiff rested its case. [84]

Mr. Campbell, on behalf of the defendant, then offered in evidence the case of

*Taylor v. Dunbar*, IV Common Pleas L. R. 206, to which offer the plaintiff objected, on the ground that the offered evidence is not pointed to any of the issues in the case; that this is not a loss that is claimed for delay, but a loss which is claimed because of a direct expenditure as a result of the peril insured against; which objection having been overruled, said case was put in evidence, and is as follows:

"KEATING, J.—Mr. Beasley has referred us to every authority which could at all favour the view



he wished to present; but they do not, in my opinion, go far enough to sustain his argument. The facts stated in the case show beyond a doubt that the proximate cause of the loss of the meat was the delay in the prosecution of the voyage. That delay was occasioned by tempestuous weather; but no case that I am aware of has held that a loss by the unexpected duration of the voyage, though that be caused by perils of the sea, entitles the assured to recover upon a policy like this. I think we should be establishing a dangerous precedent if we were to give effect to Mr. Beasley's argument, seeing that there are so many cargoes which are necessarily affected by the voyage being delayed. I am not disposed to create such a precedent. I think our judgment ought to be for the defendant.

“MONTAGUE SMITH, J.—I am of the same opinion. The loss here has arisen in consequence of the putrefaction of the meat from the voyage having been unusually protracted. That is a loss which does not fall within any of the perils enumerated in this policy. To render the underwriters liable, it must be shown that the loss is proximately due to one of the known perils. Retardation or delay of the voyage is not one of them. The case states that the meat was not affected by the sea or by the storm. It was not, therefore, as Mr. Beasley wished us to assume, damaged by knocking about. If it had been, the case might have been brought within the principle of *Lawrence v. Aberdeen*, and *Gabay v. Lloyd*. But the statement in the case [85] precludes us

from drawing any such inference. If we were to hold that a loss by delay, caused by bad weather or the prudence of the captain in anchoring to avoid it, was a loss by perils of the sea, we should be opening a door to claims for losses which never were intended to be covered by insurance, not only in the case of perishable goods, but in the case of goods of all other descriptions. By the common understanding both of assured and assurers, delay in the voyage has never been considered as covered by a policy like this. I therefore agree that our judgment should be for the defendant.

“Brett, J. I am also of opinion that damage to goods caused by delay of the voyage, though the consequence of stormy and tempestuous weather, is not one of the perils covered by an ordinary policy. Such damage must have occurred many times, and yet no trace is to be found of such a claim being maintained. If it be desired, a clause may easily be inserted in the policy to meet the case.

Mr. FRANK.—Now, that your Honor has heard the case read, I move to strike it out as being immaterial and incompetent and having no bearing whatsoever on the issues in this cause. That simply holds that the proximate cause of the loss must be insured against. That is all it holds.

The COURT.—The motion will be denied.

Mr. Campbell then offered and read in evidence, on behalf of defendant, the case of

Bink and Others v. Fleming, 25 Q. B. D. 396, to which offer the plaintiff objected, on the ground that the offered evidence is not pointed to any of the issues

in the case; that this is not a loss that is claimed for delay, but a loss which is claimed because of a direct expenditure as a result of the peril insured against; which objection having been overruled, said case was put in evidence, and is as follows: [86]

“Lord ESHER, M. R.—It is well settled that by the law of England there is a distinction in this respect between cases of marine insurance and those of other liabilities. In cases of marine insurance the liability of the underwriters depends upon the proximate cause of the loss. In the case of an action for damages of an ordinary contract, the defendant may be liable for damage, of which the breach is an efficient cause or *causa causans*; but in cases of marine insurance only the *causa proxima* can be regarded. This question can only arise where there is a succession of causes, which must have existed in order to produce the result. Where that is the case, according to the law of marine insurance, the last cause only must be looked to and the others rejected, although the result would not have been produced without them. Here there was such a succession of causes. First, there was the collision. Without that no doubt the loss would not have happened. But would such loss have resulted from the collision alone? Is it the natural result of a collision that the ship should be taken to a port for repairs, and that the cargo should be removed for the purposes of the repairs, and that, the cargo being of a kind that must be injured by handling, it should be injured in such removal? A collision might happen without any of these consequences. If it had not been for the re-

pairs, and for the removal of the cargo for the purpose of such repairs, and for the consequent delay and handling of the fruit, the loss would not have happened. The collision may be said to have been a cause, and an effective cause, of the ship's putting into a port and of repairs being necessary. For the purpose of such repairs it was necessary to remove the fruit, and such removal necessarily caused damage to it. The agent, however, which proximately caused the damage to the fruit was the handling, though no doubt the cause of the handling was the repairs, and the cause of the repairs was the collision. According to the English law of marine insurance only the last cause can be regarded. There is nothing in the policy to say that the underwriters will be liable for loss occasioned by that. To connect the loss with any peril mentioned in the policy, the plaintiffs must go back two steps, and that, according to English law, they are not entitled to do.

“For these reasons I think that the judgment of Mathew, J., was right. The case of *Taylor v. Dunbar* seems to me to have been decided upon substantially the same view as that which I have endeavored in somewhat different terms to state, and it appears to me to be really an express authority in favour of our decision. With regard to the American [87] authorities, the American law on the subject seems to differ materially from our law, and therefore it is not necessary to consider them.

“LINDLEY, L. J. It appears to me that the judgment of Mathew, J., was correct. It has long been the settled rule of English law with regard to



marine insurance that only the *causa proxima* or immediate cause of the loss must be regarded. The rule is well known, and people must be taken to have contracted on that footing. In principle the case appears to me to be governed by the decision in *Taylor v. Dunbar*. The evidence shows that the damage to the fruit was due to the joint operation of the handling and the delay. When the policy is looked at, there are no words applicable to a loss occasioned by these causes.

“BOWEN, L. J. I am of the same opinion. Whether we consider the damage occasioned by the delay or that occasioned by the handling of the fruit, the same principle appears to apply. The proximate cause of the loss was not the collision or any peril of the sea. It was the perishable character of the articles combined with the handling in the one case, and the delay in the other. The case appears to me to be undistinguishable in principle from *Taylor v. Dunbar*. For these reasons, I think the appeal should be dismissed.”

Mr. FRANK.—Now, that your Honor has heard the case read, I move to strike it out as being immaterial and incompetent and having no bearing whatsoever on the issues in this cause. That simply holds that the proximate cause of the loss must be insured against. • That is all it holds.

The COURT.—The motion will be denied.

Mr. Campbell then offered and read in evidence the case of

The Great Indian Peninsula Railway Company  
v. Sounders, 2 Best & Smith Rep., Q. B. 266,  
as follows:

“ERLE, C. J. I am of opinion that the judgment of the Court of Queen’s Bench ought to be affirmed.

“This is an insurance on goods ‘warranted free from particular average’—in effect an insurance against a total loss. According to the statement before us, the facts are these. The [88] carriage of the goods was prepaid, amounting to 629 £. 9 s. 10 d.; the ship, sailed, and, having been damaged, was taken into an intermediate port under circumstances which constituted a constructive total loss of the ship; but the cargo was landed and delivered to the plaintiffs who were the owners of it, and by them taken to its destination in a state undamaged by sea in any way. After the happening of this misfortune to the ship, the plaintiffs paid 825 £, 11 s. 7 d. more for the new voyage; and they now seek to recover this latter sum, or the difference between the two sums, from the insurer; and the question is, are they entitled to do so?

“It is certain that the plaintiffs cannot recover here as for a total loss of the goods, seeing that the goods were restored to them in specie, and forwarded by them to their place of destination, where, so far as any sea damage is concerned, they may have received full value for them.

“But Mr. James ably argues that the plaintiffs are entitled to recover this money; not as compensation for loss of the goods within the general language of the policy; but as the expense of forwarding them to their destination in other vessels, under what has been called ‘the labour and travel clause,’ which empowers the assured to sue, labour, and travel to save the thing assured from impending loss. The sub-

stantial ground, however, on which I decide this case is entirely beside his able argument. The expenses that can be recovered under the suing, labouring and travelling clause are expenses incurred to prevent impending loss within the meaning of the policy. Now, here the goods were given up to the plaintiffs in perfect safety; and the question is, were these expenses incurred to prevent a total loss? Had the owners a right when the goods were given into their possession to turn the transaction into a total loss? Certainly not, for they had the goods in specie, and consequently that 825 £ 11 s. 7 d. had no reference to suing, labouring, or travelling in order to prevent such a loss.

“A great part of Mr. James’s argument turned on the different meanings of the word ‘average.’ If it were necessary to go into that point, I should clearly be of opinion that the words found in an instrument in common use should be taken according to the ordinary understanding of them when so used. It is agreed that ‘particular average’ has two meanings, universally understood—that when taken with reference to the common memorandum clause it excludes certain expenses, but when taken with reference to the money to be paid by the underwriter it includes them. In Arnould on Insurance, vol. 2, 970, sec. 358, 2d ed., it is said that such expenses as these [89] are to be included. But all this is beside the question now before us, as these expenses have nothing to do with the labour and travel clause. I also think that it should make no difference in our judgment whether the freight was prepaid or to be earned.

“For these reasons, and also those given in the Court below, which are quite satisfactory to my mind, and where the difference between this case and the American case of *Mumford v. The Commercial Insurance Company*, 5 Johns. U. S. Rep. 262, is clearly pointed out, I am of opinion that the defendant is entitled to our judgment.”

The following proceedings were then had:

Mr. CAMPBELL.—Before proceeding, if the Court please, I should like to refer your Honor to the decision of the Circuit Court of Appeals for this circuit in

*Maritime Insurance Company v. M. S. Dollar Co.,*

in which the Court comments upon the procedure to be followed in cases of this character involving questions of English law.

(Continuing.)—I think it can be read from the case as pointed out that under a contract of marine insurance to be governed by English law, it is the duty of the Court to instruct the jury as to what the law of England is; that it is not a question of fact to be left to the jury.

The COURT.—That was my understanding of it, but the anomalous method, however, is permitted of submitting this so-called evidence of judicial decisions to the jury. It shows the application of what I suggested at the opening of this trial, that it is not a case for a jury at all, where the only question is a question of the English law.

Mr. FRANK.—In view of the repeated suggestions of the Court regarding that matter, and with-



out desiring to take any particular exception to them at this time, although I think it [90] is open to exception, I am willing at this time to withdraw the case from the jury and submit it to the Court.

Thereupon a written stipulation was made by both parties and filed, waiving a jury. The jury was discharged and the trial then proceeded before the Court without a jury.

Mr. Campbell then offered and read in evidence

Gow v. Marine Insurance, p. 186,  
as follows:

“There are certain expenses connected with a vessel's putting into a port of refuge in distress, such as warehousing, reshipping, and forwarding charges. These when incurred by the shipowners have always been charged by him against the cargo, and are admitted by law in certain cases as properly chargeable. Underwriters agreed to assume responsibility for their proper proportion of such charges, and this arrangement was embodied in what was known as the ‘forwarding clause’:—

“To pay warehousing, forwarding, and other special charges if incurred.

“But *special charges if incurred* might be much too comprehensive a phrase; an attempt might be made to include under it such charges as distance freight payable to a foreign ship condemned at an intermediate port, and other expenses such as would not be recovered under an ordinary English ‘clean’ policy (i. e. policy consisting simply of the common text and the memorandum). To prevent any such incidence on underwriters of amounts not already at

their charge, the words 'if incurred' were omitted, and the clause was completed with the phrase 'for which underwriters would otherwise be liable,' where 'otherwise' means 'by some provision of the policy different from the clause now under discussion.' The forwarding clause thus stood:

"To pay any special charges for warehouse rent, reshipping, or forwarding, for which underwriters would otherwise be liable."

Mr. Campbell next offered and read in evidence Rule 12 of the Rules for the Construction of a policy, in the English Marine Insurance Act of 1906, as it appears in

Chalmers and Owens Marine Insurance Act,  
(2d ed.), p. 160, [91]

as follows:

"The term 'all other perils' includes any perils similar in kind to the perils specifically mentioned in the policy."

Mr. Campbell then offered and read in evidence subdivision (b) of Section 55 of The Marine Insurance Act of 1906, as follows:

"Unless the policy otherwise provides, the insurer on ship or goods is not liable for any loss proximately caused by delay, although the delay be caused by a peril insured against."

Mr. Campbell then offered and read in evidence the case of

Greer v. Poole and Others, 5 Q. B. Div. 272.  
to which offer the plaintiff objected, on the ground that the offered evidence is not pointed to any of the issues in the case; that this is not a loss that is

claimed for delay, but a loss which is claimed because of a direct expenditure as a result of the peril insured against; which objection having been overruled, said case was put in evidence, and is as follows:

“LUSH, J. This is an action on a marine policy on goods on a voyage from Lagos to Marseilles in a French ship. By the terms of the policy general average was to be payable as per judicial foreign statement.

“The ship having come into collision with another ship put into Gibraltar for repairs. The cargo was undamaged. The master not having funds enough to do the necessary repairs, took up a loan on bottomry upon ship, freight, and cargo. On arrival at Marseilles the bondholder took proceedings to enforce his rights against ship, freight and cargo, and ship and freight proving insufficient to satisfy the bond, the plaintiff had to pay the deficiency in order to release his goods. A judicial average statement was made out at Marseilles, which, however, did not comprise the sum paid to the bondholder, as the payment had not then been made. The defendants paid into court a sum sufficient to satisfy the claim for particular charges and expenses and general average under the adjustment, and the only question submitted to us is whether the amount paid to release the goods is recoverable under the policy. On the argument, Mr. Cohen, who appeared for the plaintiff, feeling that [92] he could not sustain the claim as general average, contended that this was under the particular circumstances a loss by perils of the sea, the circumstances relied on being that the French law entitled

the owner of the vessel in question to abandon the ship and freight to the bondholders and thus to release himself from further liability, the French law differing in this respect from English law. Whether this contention is well founded or not is not in our opinion material; for, supposing it to be so, it does not make the loss a loss by perils of the sea. The proximate cause of the loss, to which alone our law has regard, was the inability of the agent of the ship-owner to pay off the charge which he had for want of funds at Gibraltar created on the cargo. The goods sustained no sea damage.

“It was further contended on behalf of the plaintiff that, as the policy was upon goods in a French ship, it must be construed as if it had been a French policy, and that under such a policy the loss would have been deemed a loss by perils of the sea.

“Whether a French policy would have been so construed is again immaterial. It is no doubt competent to an underwriter on an English policy to stipulate, if he think fit, that such policy shall be construed and applied in whole or in part according to the law of any foreign state, as if it had been made in and by a subject of the foreign state, and the policy in question does so stipulate as regards general average, but except when it is so stipulated the policy must be construed according to our law and without regard to the nationality of the vessel. Our judgment is therefore for the defendants.”

Mr. FRANK.—Now, that your Honor has heard the case read, I move to strike it out as being immaterial and incompetent and having no bearing what-



soever on the issues in this cause. That simply holds that the proximate cause of the loss must be insured against. That is all it holds.

The COURT.—The motion will be denied.

Mr. Campbell then offered and read in evidence the case of

Powell and Another v. Gudgeon, 5 Maule & Selwyn's Reports, 431,

to the admission of which plaintiff objected, and the said evidence was admitted, subject to said plaintiff's objection [93] and exception:

“Lord ELLENBOROUGH, C. J.—Emerigon, whose name has been so frequently mentioned in the course of the argument, is entitled to all the respect which is due to a very learned writer in discussing a subject with great ability, diligence, and learning, and adverting to all the authorities relating to it, but, still, his opinion, like the opinion of any other learned man, is fallible; and, in the present instance, it is founded on a great many ordinances which do not govern our decisions. Laying out of the case the opinions of foreign jurists, and all which does not properly bear on the point in question, I am inclined to think the damage in this case is to be considered as not arising immediately from a peril of the sea, although in a remote sense, it may be said to have been brought about by a peril of the sea; but our rule of construction is, *causa proxima non remota spectetur*. The injury to the assured was caused by the sale of their goods; but no one will contend that the sale was an immediate consequence of a peril of the sea. The peril of the sea damaging the ship rendered

it innavigable; to restore its navigability a refitment became necessary. The captain, who was interested in and bound to have the ship in a navigable state, being unable to raise the means for refitting her, was obliged to apply to the owners of the goods for a loan, through the medium of a sale of part of the goods. It was therefore a sort of forced loan which was the proximate cause of loss to the owners from the sale of their goods. This was indeed connected with a peril of the sea, because a peril of the sea occasioned damage to the ship, which made repairs necessary, and funds to provide these repairs; but it was the want of funds *aliunde* which obliged the captain to have recourse to a sale of the goods. In conformity, therefore, to the rule that the proximate cause, and not that which is remote, is to be looked to, I think the underwriter is not liable. Giving the largest construction to the general words 'perils of the seas,' I think this is not a case of immediate loss by perils of the seas. Without going into an inquiry how far this resembles the case of jettison, or of general average, the discussion of which might raise future doubts, I say that perils of the sea are too remote a cause of the present loss to make the underwriter liable.

"BAYLEY, J. I am entirely of the same opinion. It does not appear to me that this was a loss by a peril of the sea, or such as entitled the assured to recover, under the general words of the policy; but a loss for which the owners of the goods will be entitled to be reimbursed by the owner of the [94] ship. The owner of the ship undertakes to have the ship fit to perform her voyage; and in case of accident, it is

the duty of the owner, and the master in place of the owner, to provide for its repair. I consider it as a rule applicable to the construction of policies, that the Court must look to the immediate cause of loss, in order to ascertain whether it be a loss within the policy. The loss here was occasioned by the act of the captain, who disposed of the goods, in order to provide himself with funds for the repair of the ship. If he could have raised these funds in any other way, he would not have taken the goods. To hold this a loss for which the underwriter is responsible, would be to make his liability depend upon the accident of the captain's being unable to provide funds for the repair, except by means of the goods. In the case of jettison the immediate cause of loss is a peril of the sea. When the whole is likely to be swallowed up by the sea, the law of jettison allows a part to be sacrificed to save the rest. Inasmuch, therefore, as we are bound, according to the common rule for the construction of policies, to look to the immediate cause of loss, and as this loss was not immediately caused by a peril of the sea, but by the inability of the captain to procure a fund for the repairs, which he was bound to do, it seems to me that this was not a loss within the policy.

“ABBOTT, J. I am also of opinion that the plaintiffs are not entitled to recover. Cases of this kind, where a sale of part of the cargo has been made under circumstances like the present, must, as I should think, have occurred frequently; and if by the law of England the underwriters had been considered as liable, we should probably have found some trace

of it in the books, whereas this appears to be the first action in which an attempt has been made to charge the underwriter. I very much doubt, whether, in the true and legal sense of the word, these goods can be considered as lost to the owner; but it is not necessary to enter upon that inquiry; as I am satisfied, upon the grounds stated by my Lord and my Brother Bayley, that the cause of loss is too remote."

Mr. Campbell next offered and read in evidence the case of

Livie v. Janson, 12 East's Reports, 647, which said evidence was admitted subject to the plaintiff's objection and exception, as follows: [95]

"Lord ELLENBOROUGH, C. J. As there is some novelty in the point, we will look further into it; though as it appears to me, this case falls within the general principle, that *causa proxima et non remota spectatur*. It therefore seems to be useless to be seeking about for odds and ends of previous and partial losses which might have happened to a ship in the course of her voyage, when at last there was one overwhelming cause of loss which swallowed up the whole subject-matter. At present, I own the case appears to me to be neither an average nor a total loss within the terms of the policy. But we will consider further of it.

"The case stood over till the end of the term, when his Lordship delivered the judgment of the Court upon it.

"This was an action on a policy on ship and goods, warranted free from American condemnation. The ship and goods were damaged by the perils of the



sea, and were afterwards seized by the American Government, and condemned; and the question is, whether the total loss by subsequent seizure and condemnation takes away from the assured the right to recover in respect to the previous partial loss by sea-damage? And upon consideration, we think that it does. It is to be recollected that nothing is properly imputable to the sea-damage but the deterioration of the ship and cargo; for though such sea-damage might stop the progress of the voyage, and so bring the ship and cargo within the reach and effect of some other distinct peril which they might otherwise have escaped, yet the substantive loss by that latter peril is imputable to such latter peril only, not to the previous sea-damage. If for instance, a ship meet with sea-damage, which checks her rate of sailing, so that she is taken by an enemy from whom she would otherwise have escaped; though she would have arrived safe, but for the sea-damage, the loss is to be ascribed to the capture, not to the sea-damage; and this upon the principle that *causa proxima non remota spectatur*. The case of *Green v. Elmslie* which was cited in the argument, proceeds upon a similar principle; there, the ship would not have been captured, had she not been driven by stress of weather upon the enemy's coast; and yet the loss was held imputable to the capture, and not to the perils of the seas, which had driven the vessel within the influence of the peril of capture. Considering the deterioration of the ship and cargo then as the extent of what is referable to the head of sea-damage, we think we may lay it down as a rule, that where the

property deteriorated is afterwards totally lost to the assured, and the previous deterioration becomes ultimately a matter of perfect indifference to his interests, he cannot make it the [96] ground of a claim upon the underwriters. The object of a policy is indemnity to the assured; and he can have no claim to indemnity where there is ultimately no damage to him from any peril insured against. If the property, whether damaged or undamaged, would have been equally taken away from him, and the whole loss would have fallen upon him had the property been ever so entire, how can he be said to have been injured by its having been antecedently damaged? To put another instance to the same effect: supposing ship and cargo to be damaged in the early part of a voyage by the ordinary sea perils, and afterwards wholly destroyed by fire before the voyage is finished; of what consequence to the owner is the damage which may have occurred from one or several successive causes of injury before the fire? And if the property, whether undamaged or not, would have been equally annihilated; is not its previous deterioration rendered wholly immaterial? The object of insurance is that the thing insured shall arrive safe at the place of destination, and that if it do not arrive at all, in consequence of any of the perils insured, the assured shall recover as for a total loss; and that if it arrive damaged, a proportionable compensation shall be paid for the damage; because in that case the proprietor receives the thing *pro tanto* in a worse condition than he ought to have done; but of what consequence to him is the intermediate condi-

tion of the thing, if he be never to receive it again? If, before the completion of the voyage, it be, as to him and his interests, in a state of utter annihilation, what is it to him whether it had been damaged or not in an anterior part of the voyage, before it became annihilated? It was truly said in the course of the argument, that the American Government were the only persons in this case who were prejudiced by the deteriorated state of the ship and cargo; they obtained it in a less valuable condition on that account than it would otherwise have been to them; but that is their loss, not that of the plaintiffs. There may be cases in which, though a prior damage be followed by a total loss, the assured may nevertheless have rights or claims in respect of that prior loss, which may not be extinguished by the subsequent loss. Actual disbursements for repairs in fact made, in consequence of injuries by perils of the seas prior to the happening of the total loss, are of this description; unless, indeed, they are more properly to be considered as covered by that authority, with which the assured is generally invested by the policy, of 'suing, labouring, and travelling, &c., for, in, and about the defence, safeguard, and recovery of the property insured'; in which case the amount of such disbursements might more properly be recovered as money paid for the underwriters under the direction [97] and allowance of this provision of the policy, than as a substantive average loss to be added cumulatively to the total loss which afterwards incurred in consequence of the sea risks. In the present case, as the immediately operating cause of total loss was one from

which and its consequences the defendant is by express provision in the policy exempted; and as the other antecedent causes of injury never produced any pecuniary loss to the plaintiff; and as there never existed a period of time, prior to the total loss, in which the assured could have practically called on the underwriters for an indemnity against the temporary and partial injury sustained by the property insured; we are of opinion, that such prior partial injury forms in this case no claim upon the underwriters of this policy; and consequently, that the *postea* must be delivered to the defendant."

Mr. Campbell then offered and read in evidence

Section 64 of the English Marine Insurance Act, as follows:

"(1). A particular average loss is a partial loss of the subject-matter insured, caused by a peril insured against, and which is not a general average loss.

"(2.) Expenses incurred by or on behalf of the assured for the safety or preservation of the subject-matter insured, other than general average and salvage charges, are called particular charges. Particular charges are not included in particular average."

and also

Section 78, Subdivision 3 of the English Marine Insurance Act, as follows:

"(3). Expenses incurred for the purpose of averting or diminishing any loss not covered by the policy are not recoverable under the suing and laboring clause."



Mr. Campbell then offered and read in evidence

Section 869 of Arnould on Marine Insurance (8th ed.), [98] as follows:

“Another class of losses, which, though not specially enumerated in the policy are nevertheless recoverable thereunder, is that which is embraced under the term ‘particular charges.’ The distinction between ‘particular charges’ and ‘particular average’ was first definitely established in our Courts in *Kidston v. Empire Insurance Co.*, where the jury, after hearing the evidence of several average-adjusters and other witnesses, found that there was in the business of marine insurance a well-known and definite meaning affixed by long usage to the term ‘particular average’ as distinguished from the term ‘particular charges’—viz., that ‘particular average’ denotes actual damage done to or loss of part of the subject-matter of insurance, but that it does not include any expenses or charges incurred in recovering or preserving the subject-matter of insurance; and that expenses incurred in warehousing and forwarding goods are not ‘particular average,’ but are termed ‘particular charges.’

“Accordingly sec. 64, sub-sec. (2), of the Marine Insurance Act, states that ‘expenses incurred by or on behalf of the assured for the safety or preservation of the subject-matter insured, other than general average and salvage charges, are called particular charges. Particular charges are not included in particular average.’ They are recoverable from underwriters when incurred after the arising of a peril insured against, in order to prevent such peril

causing a loss for which the underwriters would be liable, if it were so caused. In this event they are charges incurred 'in and about the defense and safeguard' of the subject-matter of insurance within the suing and labouring clause. In certain cases they may also be recoverable from underwriters, apart from the suing and labouring clause, as losses occasioned by a peril insured against when they have been necessarily incurred in consequence of such a peril—as, for example, expenses of warehousing and forwarding cargo, when a peril insured against has occasioned the necessity of such expenditure."

Mr. Campbell then offered and read in evidence the case of

Great Indian Peninsula Ry. Co. v. Saunders, 1

Ellis, Best & Smith, Q. B., 41,

which case was also read in evidence by Mr. Frank and is hereinbefore [99] set forth.

Mr. Campbell then offered and read in evidence the case of

Booth v. Gair, 15 Com. Bench Reps., (N. S.) 290, which case was also read in evidence by Mr. Frank and is hereinbefore set forth.

Mr. Campbell then offered and read in evidence the case of

Kidston v. Empire Marine Insurance Co., 1

Com. Pleas L. R. 535,

which case was also read in evidence by Mr. Frank and is hereinbefore set forth.

Mr. Campbell then offered and read in evidence the case of

Kidston and Others v. The Empire Marine Insurance Company, 2 Com. Pleas L. R. 357, as follows:

“Appeal from the decision of the Court of Common Pleas, discharging a rule to enter a verdict for the defendants or a nonsuit.

“The plaintiffs had effected an insurance with the defendants on the chartered freight, valued at £5000, of a ship SEBASTOPOL, on a voyage from the Chincha Islands to the United Kingdom. The policy contained the usual suing and labouring clause, and a warranty against particular average. The ship having been damaged in a storm put in to Rio, where she became totally lost, but the goods were landed and forwarded to their destination in another vessel, the CAPRICE, at a cost of £2467 11s. 10d., and the chartered freight was then paid to the plaintiffs. The action was brought to recover from the defendants a proportionate part of the sum so expended in forwarding the goods from Rio.

“Evidence was given at the trial of the meaning of particular average as understood among merchants.

“The facts are stated at length in the report of the case in the court below \* \* \*

“KELLY, C. B. In this action, which was on a policy upon freight, a question of great importance to the mercantile community has arisen, and has for the first time, at least in this country, received a judicial decision in the Court of Common Pleas, which decision is now under appeal before us, and which we are called upon to affirm or to reverse.

“The facts are few and simple. The plaintiffs chartered the ship SEBASTOPOL from the Chincha Islands to a port in Great Britain, and effected an insurance upon freight for 2000£ by the policy in question, the freight being valued at £5000 [100] and the policy contained a warranty against particular average, with the well-known suing and labouring clause, as adopted in English insurance. The ship sailed from the Chincha Islands, and in rounding Cape Horn became so greatly damaged that she afterwards put into the port of Rio, where she became a wreck, and may be deemed to have been totally lost. The cargo of guano was landed and warehoused, and was afterwards shipped on board a vessel called the CAPRICE, chartered by the plaintiffs, and was forwarded in safety to its destined port in Great Britain, at an expense for freight of 2467£ 11s. 10d.,

“Under these circumstances the plaintiffs brought this action, with a count claiming for a total loss of freight, and another count for 1145£ 3s. 6d. under the suing and labouring clause, for the charges and expenses of conveying the cargo from Rio to this country. It was contended for the plaintiffs that when the ship had become a wreck, and the cargo had been landed at Rio, when no freight could be claimed by the law of England *pro rata itineris*, that a total loss of freight had been incurred; and that inasmuch as the proportion of the homeward freight by the CAPRICE being a charge incurred in preserving the subject-matter of the insurance, and so relieving the defendants, the underwriters, from the



liability as for a total loss of freight, it was a charge within the suing and labouring clause, which the plaintiffs were entitled to recover. On the other hand it was insisted for the defendants that, inasmuch as the plaintiffs were able to forward the goods to England by another vessel, at an amount of freight substantially less than the entire freight, as valued under the policy, a partial loss only, and not a total loss of freight, had been incurred, which the warranty against particular average precluded the plaintiffs from recovering. It was argued that the master was bound, under the circumstances that had occurred, to forward the goods to England; that his ability to do so, and so to earn the whole of the freight, subject to a deduction of the cost of the conveyance from Rio to this country, made the case one of partial and not of total loss, and so within the particular average clause. We are of opinion, however, that upon the ship SEBASTOPOL becoming a wreck at Rio, and the goods having been landed there, inasmuch as no freight *pro rata itineris* could be claimed, a total loss of freight had arisen, and that the expenses incurred in forwarding the goods to England by another ship were charges within the suing and labouring clause, incurred for the benefit of the underwriters to protect them against a claim for total loss of [101] freight, to which they would have been liable but for the incurring of these charges, and that consequently the amount is recoverable under that clause in the policy.

“The question raised by the defendants, whether the owner was bound, under these circumstances to

forward the goods to England, is attended with some difficulty and uncertainty. It has been much considered, and in effect decided, in America. Parsons, on Maritime Law, vol. II, p. 385, lays it down 'that there is a total loss of freight when the ship and cargo are totally lost, or the vessel becomes wholly unnavigable, or is subject to a detention of such a character as to break up the voyage. It is said, in some cases, that if the loss of the ship be only constructively total, that is, made so by abandonment, the owner may abandon also the freight, and claim as for the total loss of it; but if, although the ship itself be wrecked and utterly lost, the master can re-ship and forward the goods by reasonable endeavors and at reasonable cost, we have seen that it is his duty to do so; and if he neglects this duty the insurer is chargeable only in the same way and to the same extent as if the duty had been performed, and the loss will be partial or total according to its amount when so adjusted.'

"It appears in a note that in a case reported, 9 Johnson 17, where the vessel was lost at an intermediate port, but the goods remained and were seized by the government, the underwriters were exempt from loss by seizure in port. It was held that if the goods could have been sent on, but for the seizure, the defendants were not liable. Kent, C. J., said: 'The point is, whether it be a good defense in any case to an action on a policy for freight, that the ship-owner refused or neglected to forward the goods by another vessel when he had it in his power. We have not met with any decided case on this point, but it

appears to be reasonable and consistent with the principles of the contract that the insurers should in such case be discharged.'

"This has never been held to be law in this country, but it must be admitted that it is not unreasonable that if the owner of freight insured fails to earn it by any default of his own, he should be disentitled to recover it against the insurer. But it is unnecessary to decide this point; for whether or not a shipowner or charterer be under a legal obligation to forward the cargo by another ship to its destined port he is at all events at liberty to do so, and thus to earn his entire freight, and we think that, under a policy like this, he is entitled to claim the cost which he so incurs under the suing and labouring clause, where such a clause is to be found in the policy, on the ground that he has thereby [102] preserved the subject matter of the insurance from total loss, to which it would otherwise have been liable upon the policy. It should seem, too, that the rule of law which in this country entitles the shipowner to recover these charges under an insurance like this against the underwriters is in strict accordance with sound policy. For if the master knows, where the ship has been lost and the cargo may be sent forward to its destined port, that his owner will be indemnified in respect of the cost which he may incur in so forwarding the goods, he will have every inducement to save the property and complete his contract with the owner of the cargo; whereas, if the cost of the conveyance of the goods for the rest of the voyage is to fall upon his owner without recourse to the under-

writers, he will be exposed to the temptation of evading the performance of what may at least be termed a moral duty, and may leave the cargo to its fate in the foreign port in which it may have been unshipped.

“We are of opinion, therefore, that whether it be the duty or not of the master, under circumstances like these, to forward the cargo in another ship to its destined port, that upon the facts of this case there was a total loss of the freight when the ship had become a wreck, and the goods had been landed at Rio; and that the cost incurred by the master in shipping the goods by the *CAPRICE*, and causing them to be conveyed to this country, is a charge within the express terms of the suing and labouring clause, and that the amount, or the due proportion of it, is recoverable under that clause against the underwriters.

“The cases of *Great Indian Peninsular Railway Company v. Saunders*, and of *Booth v. Gair* have been pressed upon the attention of the Court, as showing that a loss of this nature is a partial loss only, and cannot be recovered against the underwriters by reason of the warranty against particular average. But these were cases of insurance upon goods, to which the *pro rata* doctrine has no application, and where, the whole or a great portion of the goods still existing in specie, it was impossible to hold that a total loss had arisen. And Mr. Justice Blackburn appears to have marked the distinction between the case of goods and that of freight, and forborne to intimate any opinion upon the point



which we have now to determine.

“But another case from the United States has been cited under the high authority of Storey, and where it is supposed to have been held that, under circumstances like these, there was a partial and not a total loss of freight, and that the underwriters were not liable upon the policy; but this case of *Jordan v. Warren Insurance Company* has really no application to the case before us. There the insurance was on freight from New Orleans to Havre; [103] the ship was run aground and injured before it left the Mississippi, but returned to New Orleans, and after unshipping the cargo, was completely repaired and reinstated, and might have taken the cargo on board again and completed the voyage to Havre; but the cargo, having been much damaged, was sold at New Orleans, under an arrangement between the parties, and the ship proceeded on another voyage, not to Havre, but to England. Under these circumstances the shipowner, who claimed as upon a total loss of freight, was held entitled to recover only upon a partial loss, that is to say, for the loss of freight upon some part of the cargo which had been destroyed before it was re-landed at New Orleans, and which therefore could never have earned freight at all by the completion of the voyage. No question was raised there concerning particular average, or the suing and labouring clause in a policy. The case, therefore, has no bearing upon the present; but it may be remarked that, where any claim to freight at all was treated as recoverable, it seemed to be upon the footing of a total loss reduced to a smaller

amount by expenses incurred for the benefit of the underwriters, and spoken of as salvage.

“It remains only to observe upon the evidence given in this case that expenses incurred in preserving the subject matter of insurance were designated as particular charges, and not as particular average. We think that this evidence in no wise controls or varies the language of the policy, and that it is admissible to show the mode in which expenses of this nature are treated by mercantile men. But this evidence, or the usage which it proves, is in affirmance of the common law of England, which of itself defines the nature and character of these charges, and if rejected and struck out of the case would leave the question in the cause as it was before.

“We think, therefore, on the whole, and upon the true construction of the policy, that on the destruction of the ship and the landing of the cargo at Rio there was a total loss of the freight, unless it could be averted by the forwarding of the cargo by another ship to Great Britain; that the forwarding the cargo by the *CAPRICE* was a particular charge within the true meaning of the suing and labouring clause, and not the conversion of total loss into a partial loss, which brought the case within the warranty against particular average; and that the due proportion of that particular charge, that charge being thus within the suing and labouring clause, and incurred for the benefit of the underwriters to preserve the subject of the insurance, and to prevent a total loss, is recoverable under the policy in this action.

"The judgment of the Common Pleas must therefore be affirmed." [104]

Mr. Campbell then offered and read in evidence the case of

Meyer and Others v. Ralli and Others, III  
Aspinall's Maritime Cases, 324,  
as follows:

"ARCHIBALD, J. This is a special case, with power to draw inferences of fact. The action is on a valued policy of insurance on 18,750 kilogrammes of rye, valued at 2731£, including 150£ advance, on a voyage from Enos to Schiedam, in the Austrian ship UNICO, warranted free of particular average unless the ship be stranded, sunk, or burnt, which was underwritten by the defendant in the sum of 2731£. The policy also contains the usual clause, that in case of any loss or misfortune, it shall be lawful to the assured, their factors, servants, and assigns, to sue, labour, and travel, for, in, and about the defense and safeguard and recovery of the said goods, merchandise, ship, etc., or any part thereof, without prejudice to the insurance, to the charges whereof the assurers will contribute.

"On the 21st July, 1865, the defendants had entered into a charter-party with one Faltata, of Venice, for the charter of the UNICO, then lying at Smyrna, to proceed to Enos, a Turkish port, and there load a cargo of grain or corn and carry it to Amsterdam or Schiedam direct, and had on the 2nd Nov. 1865, shipped at Enos on board the vessel, of which Antonio Lucovich was the master, a cargo equal to 2,343 English quarters, or 6,800 hectolitres

of rye, sound and in good order and well conditioned. The captain received at Enos 150£, pursuant to the terms of the charter-party. He also signed a bill of lading.

“On the 8th Nov. the UNICO, then laden with the said cargo in bulk, left Enos, on the voyage. On the 14th Nov. the plaintiffs, through their agents, Messrs. Schroder and Bonniger in London, purchased from the defendants for 2,735£ 8s. 6d., the cargo in question, including freight and insurance to Schiedam, as per charter-party; and on the 21st Nov. the defendants handed to them the policy in question.

“During the months of November and December, 1865, the UNICO on her voyage met with very tempestuous weather, in consequence of which she was obliged to jettison a portion equal to 300 hectolitres of the insured cargo; and on the 14th Jan., after hoisting signals of distress, she was taken by a French fishing smack into the port of La Rochelle, in France. On her arrival there, the captain placed [105] himself in the hands of Messrs. Admyrault and Seignette. Mons. Admyrault was the Austrian Consul, and his firm made all necessary advance of cash to the captain.

“Certain proceedings were, as stated in the special case, taken at the instance of the captain in the Tribunal of Commerce at La Rochelle, in consequence of which, first a portion, and eventually the whole of the cargo was landed and warehoused by order of the Court. On the 10th Feb., 1866, a portion of the cargo, amounting to 5,552 kilogrammes, was, by order of the Tribunal of Commerce, sold, and real-



ized 8,537 fr. 65 c. On the 21st Feb., 1866, on the petition of the captain, the Court ordered the sale of the residue of the cargo by public auction.

“Immediately on receiving information of this order, on the 21st and 22nd Feb., 1866, Messrs. Schroder and Bonniger, on behalf of the plaintiffs, gave notice of abandonment to the defendants, on the ground that in the opinion of experts or surveyors, the rye could not be forwarded to its destination. This notice the defendants declined to accept.

“On the 5th March, 1866, the defendants in their capacity of shippers, vendors, and insurers of the cargo, summoned Captain Lucovich before the Tribunal of Commerce for the purpose of having it decreed that there was no occasion to sell the residue of the rye, and for a new survey to be ordered. The Tribunal of Commerce thereupon ordered that the sale of the rye should be provisionally suspended, and that a new inspection should be proceeded with by three surveyors, whose instructions were to say if it were possible by continuing the expedients of manipulation and ventilation to preserve it in its good condition, so as to enable it to be re-shipped without risk, and to be conveyed to Schiedam, its destination.

“On the 14th March, the surveyors having examined the rye, then in certain warehouses, were unanimously of opinion that the grain might be perfectly well reshipped and conveyed without any danger to Schiedam, recommending that, if not reshipped very speedily, it should be subject to ventilation once a month until the moment of its being put

on board for conveyance to its destination. This report was confirmed, and ordered to be executed by the said Court, and notice of it was given to the plaintiffs on the 17th March, 1866, together with notice that any course pursued with the cargo or any portion of it was for their account, and on their responsibility.

“On the 11th May, 1866, the Captain of the UNICO applied to the Tribunal of Commerce for and obtained authority to raise a loan on the bottomry of the ship, freight and cargo. On the 6th June the Captain filed a petition in the Tribunal of Commerce, stating that he had been unable to effect a loan on bottomry, and asking the Tribunal to declare the ship unnavigable under Articles 369 and 389 of the French Code de Commerce, and a decree was made in conformity with the petition. [106]

“On the 21st June, 1866, Messrs. Admyrault and Seignette, who had made considerable advances to meet the several expenses caused directly and indirectly by the forced interruption of the voyage summoned the captain before the Tribunal of Commerce, to show cause why in default of payment to them of 20,000 francs within a fortnight from that date, they should not be authorized to sell for account of whom it might concern the said ship and the remainder of the cargo, the price to be paid over to them and used for the purpose of covering the advances made or to be made, and the surplus paid over to whom it might by justice be commanded; and upon the 11th July, 1866, after service of the last-mentioned sumomsn, Captain Lucovich issued a summons to the under-

writers, and the then unknown holder of the bill of lading of the cargo, in order to their becoming parties to the suit commenced by the summons of the 21st of June, and submitting such conclusions and arguments as they might think proper, and to hear it declared that the judgment to be pronounced was to be common to and binding upon all the parties.

“The summons of the 21st of June came on for hearing on the 14th of Sept., 1866, in the absence of the defendants or any person appearing on their behalf, when the Tribunal ordered the sale of the ship UNICO, and a statement of general and particular average of the ship and her cargo to be drawn up, which was accordingly done.

“On the 22nd Oct., Messrs. Michel et fils, having on behalf of the plaintiffs, made a claim for payment of 3.780 francs for the advance freight paid to Captain Lucovich, and the captain inferring from this that the plaintiffs were the holders of the bill of lading for the cargo, then served upon them a notice of the judgment of the 14th Sept. 1866, and a summons to attend on all subsequent proceedings.

“The plaintiffs had not, prior to the 23d Oct., informed the master of the UNICO that they were the holders of the bill of lading, and had not been summoned to attend any of the proceedings before the Tribunal of Commerce, and had not made themselves parties to any of the proceedings.

“On the 21st Dec. 1866, the Tribunal of Commerce remanded to the 25th Jan., then next the decreeing respecting the statement of average; but nevertheless, on several grounds, among others that the state

of the weather was unfavorable to its preservation, ordered the sale of the remainder of the cargo of the UNICO, and the purchase-money was ordered to be paid over to Messrs. Admyrault and Seignette, to cover the advances made by them which included expenses incurred in and about the unsold portion of the rye down to the date of the decree, together with the charges required [107] by the law—the costs to be costs of average. This last mentioned judgment was given in the absence of any person representing the defendants. On the 10th Jan., under the said order, the remainder of the cargo was sold by public sale at La Rochelle, and realized a net sum of 27,830 fr. 30 c.

“The total agreed freight of the cargo from Enos to Schiedam was 16,695 fr. 95 c. Of this 3780 fr. (150 £ sterling) was, as already stated, advanced at Enos, leaving 12,915 fr. 95 c. unpaid.

“On the 25th Jan. the Tribunal of Commerce, by its judgment, declared that the freight for conveyance of the cargo from Enos to Schiedam was due in its entirety (including freight on the 300 hectolitres jettisoned), and that the advance to the captain on account of freight at Enos must contribute to general average, and referred back the statement to the average stated for the purpose of modifying the calculations therein; keeping in view, first the said judgment, secondly the sum realized by the sale of the rye, thirdly the various costs in the suit. The Tribunal also said that the average staters were at the same time to establish the net amount of the freight to be received by the captain out of the sum



realized by the sale of the cargo.

“The plaintiffs in this action were summoned through their agents, Messrs. P. Michel et fils, to appear in these proceedings, but they made default, and the judgment of the 25th Jan., was rendered without any opposition. The defendants in this action were not summoned to appear or defend the proceedings of the Tribunal of Commerce otherwise than by a summons left at the bar of the Procureur Imperial, according to French procedure, but not received by the defendants.

“On the 24th May, 1867, the Tribunal of Commerce confirmed an amended statement of general and particular average which had meanwhile been made, and condemned the plaintiffs to pay the sum of 12,915 fr. 95 c. remaining due on account of freight, with interest from the 11th July, 1866, to the time of payment, and ordered that sum, being, as stated in the judgment, secured on the cargo, should be paid to Captain Lucovich by Messrs. Admyrault and Seignette as consignees. The said sum, together with 1,000 francs damages and interest thereon from the 28th June, 1867, together with an additional sum for costs subsequent to that date, was paid ultimately at La Rochelle to Captain Lucovich, after divers proceedings taken by him against the plaintiffs, out of the proceeds of the cargo. Such payment was made under and in pursuance of a judgment of the Civil Tribunal of La Rochelle of the first instance, dated the 7th Aug. 1867. [108]

“It is stated in paragraph 52 of the special case that, by the Law of France, the Tribunal of Com-

merce had jurisdiction to order the said various surveys of the ship and cargo and statements of average, and to make the said various orders, judgments, and decrees, but that it is a court of first instance of inferior jurisdiction, and its judgments, orders, and decrees are subject to appeal to the Imperial Court at Poitiers, which, if made, is usually decided in four or five weeks, and that no appeal was taken on the part of the plaintiffs.

“It was admitted also in the case that the damages referred to in paragraphs 8, 11, and 13 were caused by the perils insured against. It is also found that the rye which was sold on the 10th Jan., 1867, was in March 1866 and in Jan., 1867, merchantable rye, and such as, if it had been carried on to Schiedam at any time between the time of its landing at La Rochelle and the time of its sale, would have fetched at Schiedam, a price considerably more than the total of all the extra expenses properly incurred in respect of it, and consequent upon the interruption of the voyage under the circumstances, including the extra freight of forwarding it to its destination. It is also admitted by the defendants that, if the proportion of freight payable upon the rye sold on the 10th Jan., under the said average statement is to be taken into account, and added to the extra expenses aforesaid, the amount would be more than the rye would have fetched at Schiedam, if forwarded to its destination either in March, 1866, or Jan., 1867.

“The questions which arise in the case are: First, whether there was a constructive total loss of the cargo; Secondly, if not, whether the plaintiff is en-

titled to recover any and what portion of the expenses under the sue and labour clause.

“For the purpose of deciding these questions, it is necessary to consider the effect of the proceedings and orders of the Tribunal of Commerce of La Rochelle. But, before doing so, it may be worth while to inquire what, under the circumstances, was the duty of the captain. It is found in the case (paragraph 51) that, by the law of France, the master under the circumstances, was not entitled to full freight upon the cargo landed there; but that by Article 296 of the Code de Commerce, he was bound to hire another vessel to carry on the cargo to its destination, and if unable to hire a vessel, was entitled to *pro rata* freight only; and that the law of Austria on this subject is the same as that of France. It is further found that it would have been practicable to hire another vessel to carry on the cargo to its destination. The case also states that the portion of the cargo that was sold by order of the Tribunal of Commerce on the 10th Jan., was [109] merchantable, and would have fetched at Schiedam a price considerably more than the total of all the extra expenses properly incurred and consequent upon the interruption of the voyage, including the extra freight of forwarding to its destination.

“It is quite clear, therefore, that if the captain had done his duty, the portion of the cargo sold on the 10th Jan., 1867, would have been forwarded to Schiedam, and that there would in the event have only been a partial loss, the portion of the cargo forwarded being only liable to pay so much of the

freight of forwarding from La Rochelle (*Rosseto v. Gurney*, 11 C. B. 176; 20 L. J. 257, C. P.), as exceeded the original rate of freight. The question is, what is the effect of the proceedings in the French courts on this simple state of the case?

“In the view which we take, we do not consider it material, for the purpose of dealing with the question, whether or not there was a constructive total loss, to discuss the effect of the various surveys and orders of the Tribunal of Commerce of La Rochelle, prior to the order of the 21st Dec., 1866, by which the residue of the cargo was ordered to be sold, except in so far as the great lapse of time without any effort on the part of the captain to perform his duty bears on the case. There are portions of those orders and judgments, no doubt, which are properly judgments *in rem*, or in the nature of judgments *in rem*, and binding as against all the world, and, amongst others, as against both the plaintiffs and defendants. But, when we come to the order of the 25th Jan., 1867, whereby it was declared that the freight for conveyance of the cargo to Schiedam was due from the plaintiffs to the shipowner (or the captain as his agent) in its entirety, it cannot be regarded as in the nature of a judgment *in rem*, and apart from the fact that the defendants were no parties to that judgment, though we draw the inference of fact that the plaintiffs had such notice of it (*Reynolds v. Fenton*, 3 C. B. 187), that they might have appeared and defended, there is this peculiarity in the case, which does not, so far as we are aware, seem



to have occurred before, that upon the express findings in the special case, by which both parties are bound, this part of the judgment seems to be manifestly erroneous in regard to the law of France, on which it professes to proceed.

“The remark that the the defendants were no parties to the judgment equally applies to the judgment of the 7th Aug., 1867, of the Civil Tribunal of La Rochelle, by which the proceeds of the residue of the cargo attached in the hands of Messrs. Admyrault and Seignette was confirmed, and the entire amount of freight ordered to be paid out of it. The defendants, therefore, can hardly be bound by the [110] declaration that the residue of the cargo which was sold on the 10th Jan., 1867, should bear its entire proportion to La Rochelle, in addition to the extra freight of conveying it to Schiedam, or by the order to pay it out of the proceeds of the goods. Moreover, even if the defendants could be considered as at all indirectly affected by such a judgment as binding the plaintiffs, the question is how far, considering the findings in the case, we should be bound to give effect to it as against the plaintiffs.

“It is a matter of nicety how far a judgment of a competent foreign court *in rem*, or between the same parties, is examinable here. The authorities on the subjects are all collected in Story's Conflict of Laws, secs. 547 et seq., and in the notes to Doe v. Oliver (Sm. L. C. 751, 7th edit.), and need not be referred to in detail.

“In the late case of Schibsby v. Westenholz (L. Rep. 6 Q. B. 155; 24 L. T. Rep. 93), the principle on

which effect is given to the judgments of foreign tribunals is stated to be, not on the ground merely of international comity, but on the ground that the judgment of a 'court of competent jurisdiction over the defendant imposes a duty or obligation to pay the sum for which judgment is given, which the courts of this country are bound to enforce; and consequently anything which negatives that duty, or forms a legal excuse for not performing it is a defense to the action': (See *Schibsby v. Westenholz*.) This principle is also assumed and acted on in *Goddard v. Gray* (24 L. T. Rep. N. S. 89; L. Rep. 6 Q. B. 139), where the majority of the court held that the judgment was binding, notwithstanding that it proceeded on a mistake as to English law, which did not appear to have been knowingly or perversely acted on.

"In Story's Conflict of Laws, the extent to which and the grounds on which a foreign judgment is said to be examinable or open to be impeached are thus summed up (Article 607): 'It is easy to understand that the defendant may be able to impeach the original justice of the judgment by showing that the court had no jurisdiction, or that he never had any notice of the suit, or that it was procured by fraud, or that it is irregular and bad by the law *fori rei judicatae*. To such an extent the doctrine is intelligible and practicable.' In *Castrique v. Imrie* (23 L. T. Rep. 348; L. Rep. 4 H. of L. 414), the House of Lords upheld a decree *in rem* of the Tribunal of Commerce of Havre, in which a decree was made in clear violation of English law, on the ground that the foreign law being ascertained as a matter of fact in the case, the

French court, with every honest endeavour to be right, was liable without any fault to go wrong either from imperfect evidence produced before it, or misapprehension of its effect. But in that case in delivering the [111] opinion of the majority of the judges, Blackburn, J., speaking of the judgment on matters of French law, says (23 L. T. Rep. N. S. 348; L. Rep. 4 H. of L. 414), 'we must (at least till the contrary is clearly proved) give credit to a foreign tribunal for knowing its own law and acting within the jurisdiction conferred on it by that law.' And in the case *Becquet v. M'Carthy* (2 B. & Ad., at p. 957), Lord Tenterden had said before, 'we ought to see very plainly that the court has decided against the French law, before we say that their judgment is erroneous on that ground,' implying that if it clearly appeared to be wrong the court would not give effect to the judgment. Here the court expressly professes to proceed on the ground of French law; and, although the presumption would be that the court in delivering judgment would be taken to know its own law, still it clearly appears that that law was not followed, and we are precluded by the findings in the case from holding that the court has rightly declared it. The contrary—to use the words of Blackburn, J.—clearly appears, and, either from inadvertence or some other reason, the foreign tribunal has gone manifestly wrong. It does not profess to declare what is the law of Austria. If it had, though equally wrong, we might have been bound by *Castrique v. Imrie* (sup.) to have given effect to it;

but it is a declaration of French law which is wrong.

“Under these circumstances we are of opinion that there is no rule of comity, and no principle on which we are called upon to give effect to such a judgment, and that *pro rata* freight only was payable on the cargo at La Rochelle. If then freed from the burden of the entire freight at La Rochelle, the case finds that the portion of the rye sold on the 10th Jan., 1867, would have realized at Schiedam more than enough to have covered the extra freight from La Rochelle, and in that event, had it been forwarded, there would only have been a partial and no constructive total loss; (see *Rosetto v. Gurney*, 11 C. B. 176.)

“We must, however, consider the effect of the order of the 21st Dec., 1866, for the sale of the residue of the goods, and whether it could under the circumstances appearing in the case, constitute a total loss.

“Now, although the sale may have been valid and binding, and the plaintiff may thereby have been deprived of the goods: (see *Cammell v. Sewell*, 2 L. T. Rep. N. S. 799; 3 H. & N. 617; 5 H. & N. 728), still, upon the facts as found, it was a sale of a portion of goods which it was the duty of the captain to have transhipped and forwarded, for which a ship might have been hired at La Rochelle, and which if forwarded at any time [112] between the time of its landing at La Rochelle, and the time of its sale some twelve months after would have realized at Schiedam considerably more than the total of all the extra expenses properly incurred in respect of it and, consequent on the interruption of the voyage.



Under these circumstances, it is impossible not to see that, although the ship and cargo were originally brought within the jurisdiction of the Tribunal of Commerce of La Rochelle by perils of the seas, the sale of this portion of the cargo was not really due to any of the perils insured against, which had long ceased to operate in regard to this portion of the goods, but was in fact made for the purpose of paying advances incurred through the captain's breach of duty. But it was strenuously argued on behalf of the plaintiffs, that the first order for sale of the entire cargo conferred on them the right to give notice of abandonment, and that nothing that occurred afterwards had varied the right. We think, however, that the proceedings in the case with respect to the last portion of the rye sold (the insurance being free of average), when taken together with the opinion we have expressed against the obligation to pay the entire freight at La Rochelle, are clearly in contradiction of that supposed right; and it becomes, therefore, unnecessary to consider a further contention of the plaintiffs, viz., that though acceptance of the notice has been declined, still the conduct of the underwriter in intervening in the Tribunal of Commerce was evidence of such acceptance, and irrevocable.

“Being then of opinion that there was no constructive total loss within the meaning of the policy, it remains to consider the next question—whether the plaintiffs are entitled to recover anything, and how much, under the sue and labour clause?

“It was argued on behalf of the defendants, that at the time the rye was unshipped it was in no danger of total loss, and that it was unshipped solely for the purposes and benefit of the plaintiffs. But it is only necessary to look at the reports which are referred to in the special case, and which are to be taken as correctly setting forth the state of the cargo at the time, to see that it was in a state of heat and partial fermentation from sea water, which if it had been allowed to go on would (and we feel constrained to draw this inference) in all probability have resulted in such damage as to be an actual total loss. It was necessary, then, for the preservation of some substantial part of the cargo, and in order to avert a total loss, to remove or unship the whole cargo.

“It cannot be contended, since the case of *Kidson v. Empire Marine Assurance Company* (L. Rep. 1 C. P. 535; 2 Mar. Law. Cas. O. S. 400, 468), that the warranty ‘free from particular average’ excludes [113] the operation of the suing and labouring clause; and that case is also an authority that the occasion upon which the expenses in this case were incurred, was such as to be within it. As to the cases of *Great Indian Peninsular Company v. Saunders* (1 B. & S. 41; 2 B. & S. 266; 6 L. T. Rep. 297; 31 L. J. 206, Q. B.), and *Booth v. Gair* (9 L. T. Rep. 386; 33 L. J. 99; 15 C. B. N. S., 291), cited to us by the defendants, we need only refer to the way in which they are distinguished by Willes, J., in his learned judgment in *Kidson v. Empire Marine Assurance Company* (sup.).

“A more difficult question is as to the amount of the expenses recoverable under this head. This depends, in our opinion, upon the amount of expenses necessary to avert a total loss, for which alone the defendants were liable. That is a matter which, we think, must be reasonably treated, and not judged too strictly. The unshipping of the whole cargo was necessary, in order to its preservation, and to the separation of the sound part from that which was irreparably damaged. But, once conveyed to the warehouse where the separation might take place, any subsequent care bestowed on that which could not be benefited by it sufficiently to enable it to be forwarded to its destination would have been of no use whatever to the residue, and would not in any way have contributed to its preservation. We are of opinion, therefore that the plaintiffs will only be entitled to recover under this head the expenses of unshipping the whole and conveying it to a warehouse where the separation took place, and of the separation, and the expense of conditioning that portion of it which was sold on the 10th Jan., 1867.

“As the case does not afford us the means of stating the amount of the expenses thus incurred, we think it must be referred back to the arbitrator to ascertain the amount, applying the principle we have laid down, and that for the sum so found by the arbitrator the plaintiffs are entitled to our judgment.”

Mr. Campbell then offered and read in evidence

“Section 1096 of Arnould on Marine Insurance (8th ed.), as follows:

“But even though the intelligence may have been

true, and the state of things at the time the notice was given such as to justify its being given (i. e., though the loss may have continued constructively total at the time the assured gave notice of abandonment), yet the doctrine has been clearly established in the English law that the right of the assured, after having given such notice, to recover as for a total loss, depends entirely on the state of things [114] as it exists at the time of action brought. If before the commencement of the action the thing insured be restored, under such circumstances and in such a state that the assured may, if he pleases, take possession of it, and may reasonably be expected so to do, this defeats his right to recover as for a total loss. Lord Tenterden thus states the law as understood in this country: 'The abandonment is to be viewed with regard to the ultimate state of facts as appearing before the action brought, according to the opinion of the Court in *Bainbridge v. Neilson*. Doubts were expressed as to the propriety of that decision by very high authority (Lord Eldon) in *Smith v. Robertson*; but, notwithstanding those doubts, the rule as laid down in *Bainbridge v. Neilson* was adopted in the two subsequent cases of *Patterson v. Ritchie*, and *Brotherston v. Barbar*. We consider the point to have been well settled, and the rule established by these authorities.' "

Whereupon, the defendant rested.

Mr. Frank then offered and read in evidence Section 901 of *Arnould on Marine Insurance* (8th ed.), as follows:



“It will be noticed that the arrangement of all articles of commerce into the three classes contained in the memorandum is a very rough one, and is simply made by forming two classes out of a dozen enumerated articles and throwing all else in the residuum. This arrangement has in recent years been very much developed, with the result that the common memorandum has in practice been very largely superseded by the insertion of special terms adapted to the particular articles at risk. It is probable that, although the memorandum was itself originally introduced in order to restrict the liability of underwriters for particular average claims, its modern development has been just as much due to the acuteness of the merchant displayed in his search for the exact form of insurance which, as regards each particular subject of commerce, will afford adequate protection for real perils without throwing upon him the burden of paying for such as are not likely to arise. For example, some cargoes are [115] not much liable to partial losses; the probability is that if they arrive at all they will arrive undamaged. The real danger in such a case is that of total loss. The merchant recognizing this fact insures at a cheaper rate with a warranty against particular average. With regard to the warranty against particular average, sec. 76 of the Marine Insurance Act contains the following provisions:—

“Sub-sec. 1. Where the subject matter insured is warranted free from particular average, the assured cannot recover for a loss of part, other than a loss incurred by a general average sacrificed, unless

the contract contained in the policy be apportionable; but, if the contract be apportionable, the assured may recover for a total loss of any apportionable part.

“Sub-sec. 2. Where the subject matter insured is warranted free from particular average, either wholly or under a certain percentage, the insurer is nevertheless liable for salvage charges, and for particular charges and other expenses properly incurred pursuant to the provisions of the suing and labouring clause in order to avert a loss insured against.

“In an English policy this warranty now takes the following, or some similar form, evolved after many years of bargaining between underwriter and merchant:—

“ ‘Warranted free from particular average, unless the vessel or craft be stranded, sunk, or burnt, each craft or lighter being deemed a separate insurance.

“ ‘Underwriters, notwithstanding this warranty, to pay for any damage or loss caused by collision with any other ship or craft, and any special charges for warehouse rent, reshipping, or forwarding, for which they would otherwise be liable. Also to pay the insured value of any package or packages which may be totally lost in transhipment.

“ ‘Grounding in the Suez Canal not to be deemed a strand, but underwriters to pay any damage or loss which may be proved to have directly resulted therefrom.’

“And apart from settled clauses, many of the large London merchants have special arrangement with

their underwriters, providing for the exact risks insured against, which vary according to the nature of each article of commerce."

Mr. Frank then offered and read in evidence the case of *Ionides v. Univ. Marine Ins. Co.*, 32 Law. Jour. Com. Pleas, 170; 14 Eng. Ruling Cas. 271, as follows: [116]

"The declaration in this case was upon a policy of insurance made by the defendants in respect of the sum of £3000 upon 6,500 bags of coffee, valued at £25,000, warranted free from particular average, unless the ship should be stranded, sunk or burnt; general average payable as per foreign statement; warranted also free from capture, seizure, and detention, and all the consequences thereof, or of any attempt thereat, and free from all consequences of hostilities, riots or commotions, by the ship or vessel called the LINWOOD, lost or not lost, at and from Rio de Janeiro to New Orleans and/or New York, calling at Balize for orders, including the risk of craft. The policy also contained a covenant that the said insurance should commence upon the goods and merchandise on board the said ship from the loading of the said goods or merchandise on board the said ship or vessel, at as above, and until the said goods or merchandise should be discharged or safely landed; and that it should be lawful for the said ship or vessel to proceed and sail to, and touch and stay at, any ports or places whatsoever in the course of her said voyage for all necessary purposes without prejudice to the said insurance. And touching the

adventures and peril which the defendants were made liable to by the said insurance they were declared to be of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and counter-mart, surprisals, takings at sea, arrest, restraints and detainments of all kings, princes, and people, of what nation, condition or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes that had or should come to the hurt, detriment, or damage of the afore-said subject matter of the said insurance or any part thereof. The declaration then averred, that the coffee was placed on board the said ship, and that, while it was so on board, the ship was stranded, and afterwards, and during the continuance of the said risk, the said goods were by divers of the perils insured against, and not by any of the excepted perils, totally lost.

“The defendants pleaded to this count that the goods were not lost by any of the said perils insured against by the said policy; and that the goods were lost by certain of the perils from which the same were by the policy warranted free.

“The action was tried before Erle, Ch. J., at the sittings in London after Hilary term, when it appeared that 6,500 bags of coffee were shipped on board the LINWOOD, at Rio, on the 24th of May, 1861. On the 26th of May she sailed from Rio, and on the 1st of June arrived at Balize, at the mouth of the Mississippi. On the 3d she left Balize for New York, and proceeded on her voyage until the



night of the 17th, when the captain, thinking he had already passed Cape Hatteras, changed his course from N. E. to N. and he continued this course until about half-past eleven, when she went on shore. [117] It was found that she had taken the ground about ten miles to the southwest of the point where the light used to be on Cape Hatteras.

“At the time the ship left Rio, and for some time previously, there had been a conflict between the Northern and Southern States of the United States of America. The former were generally distinguished by the name of Federals and the latter by that of Confederates. By foreign nations generally, and between themselves to a considerable extent, the two parties to the conflict were respectively treated as independent belligerent states, to which the ordinary law of nations as regards belligerents was applicable.

“Up to the 15th of April preceding this disaster, there had always been a light on Cape Hatteras, but on that day it was extinguished by order of the State authorities of the State of North Carolina, which had joined the Confederates. The object of so doing was to hinder the Federal navigation. The fact both of the existence of the war and of the extinction of the light was unknown to the master of the LINWOOD until the day after the disaster. His vessel was the property of Federal owners, and the cargo that of a British merchant.

“On the morning of the 18th of July, two officers of a militia regiment of North Carolina, who were

then in charge of that part of the coast, came on board the LINWOOD; but, after remaining only a short time, returned on shore taking the master with them, and in the course of the same day both he and the crew were made prisoners, and not allowed again to go on board the vessel. No portion of the cargo was removed, or could be removed on that day, on account of the rough state of the weather. On the following day 120 bags of coffee were safely landed from the ship by certain persons called wreckers, but who were, in fact, salvors, and who acted under the orders of an officer holding a commission for that purpose under the Federal government.

“A thousand bags more could have been saved but for the interference of the soldiers of the above-mentioned militia regiment, who prevented it. The ship broke up on the 20th, and all the coffee but the 120 bags which had been brought on shore was totally lost.

“The above facts were admitted at the trial, when a verdict was entered for the plaintiff for the amount claimed, leave being reserved to the defendants to move to enter a nonsuit, or to reduce the damages, on the ground that the loss was occasioned by the excepted perils, or at least that a partial loss was by such perils turned into a total loss. The Court to have power to draw such inferences as a jury might draw from the above facts. \* \* \* [118]

“ERLE, Ch. J.—In this case I am very much obliged to the learned counsel who are concerned on both sides for their very able argument, the result of

which is, in my opinion, that we ought to give our decision in favor of the plaintiff in respect of a partial loss.

“This was an action upon a policy of insurance upon coffee, and the policy contained this clause of exception: ‘Warranted free from capture, seizure, detention, and all the consequences thereof, and of any attempt thereat, and free from all the consequences of hostilities, riots and commotion.’ It turns out that the insured ship, with a cargo of coffee on board, in proceeding from Balize to New York, had to pass by Cape Hatteras. What the Captain intended was to steer northeast till he had rounded the Cape, and then to steer due north to New York; but he got out of his reckoning, and when he was thirty miles south of the Cape and ten miles westward of it, thought that he had passed it. The consequence was that turning to the north too soon he ran ashore.

“If there were nothing more in the case, it would be a clear loss by perils of the sea; but there is this further fact to be taken into consideration, that at Cape Hatteras there had been maintained, until the secession of North Carolina from the United States, a lighthouse, and when, at the outbreak of the present war in America, North Carolina seceded and sided with the Confederate States, the light at Cape Hatteras was put out for a hostile purpose; the Federal ships being likely to suffer from the want of the light, if they had to pass Cape Hatteras.

“I also take as a fact for the purpose of this judg-

ment that, if there had been a light on Cape Hatteras, the captain could have seen it and could have put his ship about, that the ship would not have been lost in the manner in which it was.

“Now the grand contention upon the first part of the case is, whether the loss of the ship was a loss caused by the consequences of hostilities within the meaning of this policy. I quite agree with the learned counsel who have argued the case on both sides that it is a question of construction; and that the intention of the parties is to be gathered from the words in the instrument with the surrounding circumstances. The words are not so usual as to have been the subject of judicial interpretation before, and it is my duty at the present moment to put that construction upon them which I think the parties to the instrument intended. I quite agree with the learned counsel who, in the course of the argument, have either affirmed or conceded that these words are to be construed in the same way as if the assured had reassured his cargo against those perils which are excepted in the warranty that we now have to construe. So that, if the action had been on that policy [119] of reinsurance, and the ship had been lost in the manner I have stated, then it would have been the duty of the Court to say whether the putting out of the light, which was a consequence of hostilities, was so connected with the loss of the ship as to make the insurer liable.

“The words are to be construed with reference to the known principle pervading insurance law, *causa*



*proxima non remota spectatur.* The relation of causation is a matter that cannot be often distinctly ascertained; but if, in the ordinary course of events, the one antecedent is constantly followed by the other sequence, they may be taken to stand, in common parlance, in the relation of cause and effect.

“Now, in the present case, were the putting out of the light and the loss of the ship so connected together as to stand in that relation in the ordinary course of events? I think they were too distantly connected with each other to stand in that relation.

“I will put an instance of what I consider a consequence within the meaning of this policy. Supposing there was a hostile attempt at the seizure of the ship, and the enemy was to follow the ship, and the ship to escape seizure was to run aground or to run ashore, the loss would be then caused by the attempt at seizure, and it would be within the exception.

“I will suppose again that the enemy gave chase to the ship for the purpose of seizing her, and to avoid being seized she got into a bay where there was neither anchorage nor port, and the wind on shore, and where, if the wind so continued, it was physically certain that she must be lost, I should say that the ship, being driven on shore by the wind, under those circumstances, was lost by the consequences of an attempt at seizure, and that it would be within the exception. The exception has reference to seizure and the consequences thereof or of any attempt at seizure.

“I will suppose a third case, that is, that the wind

did change, and that the ship got out of the bay and proceeded on her voyage, and afterwards in the course of the voyage was overtaken by a storm, which she would have avoided by having arrived at her port if she had not been obliged to deviate and delay by reason of the attempt at seizure. If she foundered in the storm, there would be then a loss which never would have occurred if there had not been the attempt at seizure. But the loss would not be connected with that attempt in that proximate relation which, in the ordinary course of events, is necessary to connect the loss with what is called the cause of the loss. The ship going out of the bay and proceeding on her [120] voyage, it is not a sequence in the ordinary course of events that if a storm should overtake her she should sink in the course of that storm. I suppose, as a fact found in the case, that if she had not been obliged to deviate she would have been safe in port before the storm came on. Then I should say that, although the consequence of the attempt at seizure was the cause without which the loss never would have happened, yet it is not the efficient cause of it, in the language used in some of the cases analogous to this, or the proximate cause of it, in the language of some other cases. The one fact is too remote from the other to call it a loss by the consequence of hostilities, and, therefore, it would be a loss by perils of the sea.

“Take another instance. The warranty extends to loss from all the consequences of hostilities. I will assume that the ship is destined for a port where

there are two channels of entrance. In one of those channels there is a torpedo which has been laid down for hostile purposes; in the other there is none. If the master of the ship coming into the port knows nothing of the torpedo and the ship is sunk and destroyed, there, of course, the consequence of hostilities leads directly to the destruction. The hostilities having induced the occupiers of the port to lay down the torpedo, if the ship struck on it and was destroyed, this is the consequence of hostilities, which are the proximate cause of the loss, and so the loss is within the exception. But suppose the master is aware that the torpedo is there, and for the purpose of avoiding the torpedo he takes the other channel, and from bad navigation the ship runs aground there, and is lost. In my opinion that would be a loss not within the exception, because by good navigation she might have passed through safely. I should say that the ship so lost would be lost by the perils of the sea, within the meaning of the policy.

“Now, let us apply these considerations to the present case. The captain had missed his reckoning, and either not having a sufficient look-out, by which he would have seen the breakers ahead when he was coming towards the shore, or not lying to in the night, when he doubted of his position, he runs on shore. And it is not, in my opinion, the absence of the light which proximately causes the running on shore, within the meaning of marine policies. It would, therefore, follow that the wreck of the ship is not within the exception, but is within the policy; and if

the wreck of the ship brought about the loss of the cargo, the insurer of the cargo is, so far, to be considered liable.

“But then follow the subsequent events. The ship struck on the Tuesday night. On the Wednesday [121] the weather was too rough to save the cargo. On the Thursday the weather was smooth enough, and considerable part might have been saved. One hundred and twenty bags were saved, and 1,120 might have been saved, but that the Confederate troops came down and interfered with the officers of the Federal government, who had the duty to save the cargo, and who were salvors in fact, though they are called wreckers.

“No doubt, when the ship was wrecked at first, and there was no appearance of being able to save any of the cargo, there was presumably a total loss of the cargo. But when the course of events showed that the ship had not gone to pieces, and there was a part of the cargo, at least, that could have been saved, then the presumption of a total loss ceased. When a part of the cargo was actually saved, of course, that presumption was demonstrated not to apply to that, and I take it to be found as a fact that 1,000 bags more could have been saved, but were prevented from being saved in the manner I have mentioned. Those 1,000 bags, as between the parties to this instrument, must be taken to have been, if I may say so, potentially saved, and they would have been saved, but that saving was prevented by the consequences of hostilities and commotion. That being



so, those 1,000 bags were brought within the exception in this policy, so that, with respect to them, the loss was a loss for which the underwriters are not liable. One hundred and twenty bags were not lost at all; for 1,000 bags the insurers are not liable, although they were lost; but for 5,380 bags the insurers are liable, for to that extent, it appears to me, there was a partial loss within the meaning of this policy.

“It was gravely contended by the learned counsel for the defendants that there was a total loss of the cargo by capture; and if there was a total loss of the cargo by capture, that would be within the warranty of exceptions, and the insurer would not be liable. But it appears to me that none of the authorities apply to the case that is now before the Court. It appears to me that the ship was in a state of wreck; that the cargo was in the nature of wreck; and that the act of the troops, in all they did on the wreck in relation to the cargo, was the act of collecting what they could despoil from the wreck for themselves, and by no means the act of troops taking possession of a ship, or of a cargo, in the capacity of troops making a capture.

“I think, therefore, that the verdict ought to be for the plaintiff for the value of the 5,380 bags, the loss of which, in my opinion, was covered by the policy. [122]

“WILLES, J.—I am of the same opinion upon all the points.

“There are three matters with reference to which

the case may be considered. First, with reference to the effect of there not being the usual light at Cape Hatteras. Secondly, with reference to the wreck and its immediate effects. Lastly, with reference to the hostile seizure by the Confederate troops. Now, so far as the absence of the light is concerned, the question to be considered is, whether the loss of the vessel in consequence of the possibility, or indeed the strong probability (as enforced by Mr. Maclachlan in his able argument) of her escape from shipwreck, if the light had been there, is to be attributed to the consequence of the hostile act of putting out the light. It may have been, in one sense, the cause of the loss; but it was not the proximate cause. It was not the absolute certain cause of the loss. The proximate and absolute certain cause of the loss was the fact of the vessel taking the wrong course, and getting on the rocks at Cape Hatteras. Now, I apprehend that, as soon as that is stated, the only question remaining to be considered is, whether there is to be applied to this case the ordinary rules of the insurance law, namely, that you are not to trouble yourself with distant causes; that you are not to go into metaphysical distinctions between causes efficient and causes material, and causes final, and so on of the rest of them, but you are to look to the proximate and immediately operating cause of the loss, and to that only; that is, whether the ordinary rule of insurance law is applicable to this policy. It has been argued that it is not applicable to this policy, because of the introduction into the exception of the words 'all conse-

quences of hostilities'; assuming, as I also intend to do, that the acts of the persons called Confererates are to be treated as hostilities. But I apprehend that that is quite a fallacious argument on the part of the defendants. I apprehend that, putting a construction on this exception, you are to look only to the proximate consequences of hostilities, notwithstanding the use of the word 'all' in that part of the policy which is for the benefit of the insured. The introduction of the word 'all,' as everybody must be aware, is unnecessary, because no rule of grammar can be more clear, and no rule has been longer adopted in the law, than that words general and words universal are all one. It seems to me that the proper construction to put on the words 'all consequences of hostilities' is the construction which you would put on the words 'consequences of hostilities.' They mean nothing more nor less. They refer to the totality of causes to be considered, not to their sequence, or [123] their proximity, or their remoteness.

"I will put this case: I will assume that a vessel upon the same course as this vessel was leaving Rio, and that the captain was acquainted with the fact that the light, on Cape Hatteras had been extinguished by the Confederates, the result of which is, that he keeps further out at sea, and so goes on shore on an island which he would otherwise have avoided, and his vessel is wrecked. To take the consequences one step further, I will suppose that the vessel is wrecked for want of a light there, which has been extinguished by a mariner, who had been himself

shipwrecked by reason of the light having been extinguished by the Confederates at Cape Hatteras, and who, being embittered against all mankind, had proceeded to put out the light on the island where the vessel is wrecked. That is a case in which the vessel is unquestionably wrecked, in some sense, in consequence of the light having been put out on Cape Hatteras; but can any person in his senses, dealing with the law of insurance, which regulates men of business and their affairs, suppose that that consequence is a consequence which is covered by this exception?

“But, if you cannot carry the exception of consequences of hostilities into all consequences, however remote, you are necessarily driven to that with which I started, namely, to say that consequences here must be dealt with according to the ordinary rule as proximate consequences.

“Nor is this a rule which is for the benefit of the assured only. It is also applied for the benefit of the insurer, and it is unnecessary to give any further instance of that than the well-known case of *De Vaux v. Salvador* (4 A. & E. 420, 5 L. J. (N. S.) K. B. 134, p. 305, *post*) which made it necessary to add another clause to policies. The insurers and the insured are equally bound by the rule, and applying that rule to this case, the wreck of the vessel was as between these parties, and according to the law applicable to the contract which they had entered into, a wreck by the perils of the sea, and not a wreck in consequences of hostilities.

“Now I come to the next portion of the case, I



mean the wreck and its effects. I prefer dealing with that before dealing with the effect of hostilities. The facts have been stated, and it is enough, therefore, in order to introduce my judgment on this point, to say shortly that the vessel was stranded, and was totally lost from the moment she went on the rocks, without hope of recovery. With respect to the cargo that was on board of her, the general law, I apprehend, is simple. The vessel having been shipwrecked, and having taken water by [124] the shipwreck, those facts of themselves would have been sufficient to give rise to a right to abandon, not only as regards the vessel, but a right as regards the cargo. And this is not a rule peculiar to our own, but is common to most systems of law. In illustration of this, I need only refer to the Treatise of Emerigon, vol. I, pp. 401, 402, ed. Boulay-Paty, 1827, where he gives an instance in which the vessel went ashore both *naufra*ge and *bris*; part of the cargo was saved, damaged, and part of the cargo was saved, not damaged; and there that most learned and experienced of lawyers seems to consider that it was a case of abandonment, notwithstanding the saving of a portion of the goods in an undamaged state; and he does so for the reason which has been stated by Mr. Maclachlan, in his argument, that the law in these cases avoids the raising of questions which it would, in the great majority of cases, deem impracticable to determine, or determine with precision.

“I am quite aware that this has not been adopted to its full extent in our jurisprudence, or in that of America; but it may serve as an introduction, be-

cause it shows that the experience of mankind is in favour of the proposition of which the authorities seem to furnish, namely, that where there is a wreck of a vessel, without any hope of recovering her, the cargo is to be treated as also lost if the circumstances are such that no part of it can be recovered for the use and benefit of the persons insured. Take the case of a vessel wrecked on an uninhabited island, where the removal of the goods from her, the sending out a vessel to do so, and bringing the goods home, would be ruinous, in comparison with the value which the goods would fetch when brought home. Of course you have there a case of absolute total loss immediately. Take, again, the case of a vessel being wrecked where the inhabitants of the island are savage people, who seize a portion of the goods, or, a portion of the goods being saved by the crew, the crew are immediately deprived of them by the savage people of the place. There, again, you have the case of a total loss. That is the case of *Bondrett v. Hentigg*, Holt's N. P. 149 (17 R. R. 625). There part of the goods was lost, part was got ashore, and the wreck was destroyed and plundered by the inhabitants of the coast, so that no portion came again into the possession of the assured; and Chief Justice GIBBS there deals with the case as one of a total loss; and he gives this reason, that the portion of the goods which were saved from the wreck, and which they got ashore, never came again into the hands of the owner. He treats that as a proximate consequence of the wreck which has taken place under [125] those circumstances.

Therefore, it is not necessary that the ship should be in a condition where it is physically impossible to get any of the goods out of her. You must take all the circumstances into account for the purpose of determining whether any of the goods can be saved for the benefit of the owner. Now, you might put as opposed to that the case of a vessel, such as we all have heard of, going down at the entrance of a dock at the port to which she is bound, the insurance still continuing, and the goods unimpaired, and all capable of being restored with very little difficulty. It is very easy to imagine any number of cases between those two, but it would be a waste of time to do so. Those seem to be the two cases at one extreme and at the other of the list which would be necessary for the purpose of illustrating the rule.

“Now, what have we in this case? We have the vessel absolutely wrecked, and the goods in this condition, that it is possible, consistent with the laws of nature, to save 1120 bags of them. It is impossible to save the 5,380. I apprehend the conclusion of good sense and also of law upon that is, that the 5,380 as to which the loss is certain when the ship strikes are as absolutely lost as the ship itself, at the same moment when she struck the rock. With respect to a thousand bags of them, under the ordinary state of things, if there had been no hostilities (still using that word in the sense which I said I could apply to it throughout), they would have been saved to the owner, subject to the salvage that was properly payable. This being the state of things we have

to consider, what was the effect of hostilities as to the 1000 bags? With respect to them, I quite agree with the argument on the part of the defendants that it was a consequence and a proximate immediate consequence of those hostilities that this portion of the cargo was not saved. I had turned over in my mind whether, as only 120 bags were actually brought on shore, and as the 1000 bags remained exposed to the original peril, and were lost by a consequence of it, whether this remark ought not to be confined to the 120 bags; but I do not think that would be dealing substantially with the question. The 1000 bags, I think, it must be taken, were kept from the shore by the operation of hostilities.

“Now comes the question whether the hostilities had any effect on the rest of the cargo? Much reliance was placed on *Livie v. Janson*, and many observations were made on the case of *Hahn v. Corbet*. With respect to *Hahn v. Corbet*, I think the learned counsel for defendants have established a sound distinction between that case and the present, because there the vessel was wrecked in such a position that, but for the subsequent coming of the enemy and taking a portion of the cargo which they removed from the [126] vessel, the whole would have been lost. It was a case therefore in which the vessel was wrecked under circumstances in which there was no probability or possibility of the goods being saved, under the circumstances, for the benefit of the owner. There was no *spes recuperandi*, and the goods which were taken by the enemy had been previously placed in a position to be totally



lost to the owners. Then, on the other hand, I do not think the case of *Livie v. Janson*, which was said to be the same as this, does at all apply, because in *Livie v. Janson* what had taken place before the capture was a simple deterioration of the vessel. The vessel was simply deteriorated; there was no total loss of any part of the adventure; she was injured but not destroyed as to the whole or part by the perils of the sea; and it was said that her subsequent immediate capture had the effect of entirely putting out of question the previous injury which she had received, because had she been the best vessel that ever sailed the seas, and without any injury whatever, she would have been immediately captured, and entirely lost to the assured, and captured by reason of an excepted peril. That appears to me to be wholly inapplicable to a case where there was a previous absolute loss or total loss, in the sense in which I use the word total, of the subject-matter in respect of which the assured seeks to recover, and that by perils of the sea. I cannot pass over *Livie v. Janson* without referring to the very able and learned work of Mr. Phillips on Insurance, in the first volume of which, at p. 673, he throws a doubt on *Livie v. Janson* and refers to cases in the Courts of his own country where the principle of that case has not been applied to an absolute loss of a portion of the thing insured. But without at all saying I go the length which Mr. Phillips goes in that work, to say that *Livie v. Janson* is not law, I am clear it can apply only to cases such as where a vessel is deteriorated, and not to the case of the subject-matter of

insurance being absolutely lost by the perils of the sea.

“Now, I must come a little closer to this point, that is, to the question whether there was a capture of the 5,380 bags, and for that purpose I will assume that *Livie v. Janson* applied. It appears to me there was no capture of the 5,380 bags of coffee. Those 5,380 bags of coffee were incapable of being saved; and it seems to me that it would be an abuse of language to say that a man captures a thing which must of necessity be snatched from his grasp the next moment by the waves; a thing of which he can have no enjoyment and no possession. It has been said, *Ipsum compedibus qui vinxerat Enosigoeum*. One may say that poetically, but to say that a man [127] captures a cargo which is on the rocks, and which cannot be got on shore, is to say that which is not the fact. The 5,380 bags were lost to the assured, and were lost to all mankind, from the moment that they were on the rocks without any possibility of their being brought on shore. The result is, as it appears to me, that the 5,380 bags of coffee were lost by the perils of the sea; that the 1000 were lost by the consequence of hostilities; and with respect to the former there ought to be judgment for the plaintiff, with respect to the latter for the defendants.

“BYLES, J.—I am of the same opinion. I speak for myself when I say that neither when I had the honour of a seat at the bar, nor since I have been in this place, have I ever been more assisted by the able arguments of counsel than I have been on the

present occasion. I think the result is to make the case perfectly clear. I will assume for the present purpose that the light at Cape Hatteras would have been visible had it been lighted in the usual way, and that the captain would have seen it, and would have recognized it, and that he could and would have turned about his vessel in time to avoid running on shore. Then, is the absence of the light, which was at the most but the absence of an extrinsic saving power, a link in the chain of causes to which the destruction of the ship is to be imputed? I do not propose to discriminate between the various sorts of causes—which is a matter that has been discussed by abler intellects than any that now exist 2,000 years ago; but this is plain and admitted on both sides: That in a contract of the nature of a policy of insurance the proximate or immediate cause is the only cause at which the Court can look. I do not enter into the reasons for that; it is established upon authority all over Europe and America, and there is no doubt at all about it; and every judgment of this Court must proceed on the hypothesis that it is established law.

“Then what were the three causes here, which—upon the assumption that the captain would have seen the light had it been there, and have saved his vessel—have caused the loss? First, the original meritorious cause, and in popular language the cause of the loss, was the miscalculation of his position by the captain. He was fifty miles to the westward of his course, and he did not know that. Now comes the absence of the light, which was, as I have said,



but the absence of an extrinsic saving power, and, in that sense, was that the cause of the destruction? As was said in the course of the argument, if a person throws himself into the Serpentine, and the drags are not near, can it be said that the absence of the [128] drags was the cause of his drowning? It was but an intervening cause, the absence of a saving power, which had it been exerted would have saved the ship. But still it leaves the proximate or immediate cause of the loss a continuation of the first original meritorious cause, namely, steering the vessel straight on to the rock which caused the loss, and that seems to me to be plainly a loss by perils of the sea. The only time that I ever entertained a doubt about it was when listening to one of the learned counsel for the defendants, Mr. Mellish. He said, suppose there had been a contract between the owner of the lighthouse and the present plaintiff to keep the light burning, and it had been proved that the light was not kept burning in accordance with the contract, and that in consequence the plaintiff in the darkness of the night was thrown on the rocks. Can any one say there would not have been a cause of action? No doubt there would. But then that is necessarily and distinctly a contract against the indirect and remote damage occasioned by the absence of this extrinsic saving power just as much as if it had been expressed in words. For a vessel cannot be lost by the absence of the light, except as an intervening cause of this nature; and in a contract of that kind a loss by subsequent sea-damage would have been included. It seems to me, therefore, that that



hypothesis does not oppose any real difficulty. I must say that from the beginning to the end of the argument the case has presented itself to me on this part of it in the same light.

“When I come to the second question, was the loss a partial loss or a total loss of the cargo, at one time, undoubtedly, I felt some difficulty. There can be no doubt that when the vessel went aground and was totally lost, with respect to the cargo it was not totally lost. The general rule as to the total loss of a cargo is, that a cargo is totally lost when it no longer exists in specie, but has become something else, either by the progress of decomposition or from some other source, when, as has been strongly put in some of the cases, it only exists in the shape of a nuisance. Or it is lost when it is inaccessible and cannot be got at. It makes no difference whether it is on the top of a rock, or at the bottom of the ocean,—in either of those cases there is a total loss of the cargo. That is not so here. The cargo after the vessel was on shore existed in specie. It was accessible, and, as my learned Brothers have observed, the salvors here, who have been called wreckers, and whose name has tended to confuse this case, would have assisted, and would had they been uninterrupted have saved 1,120 bags. My Brother Willes and my Lord also have already pointed out the distinction between this case and *Hahn v. Corbet*. Since I had the pleasure [129] of hearing Mr. Mellish, I have had an opportunity of looking at that case, and I have looked into it very carefully, and undoubtedly, whatever were the facts of that case,

the Chief Justice puts it distinctly upon the question, When were the goods lost? They were lost when the ship was totally lost; no other ship was near; there was no land near; it was just as if they had been cast on a rock, and they had been completely out of reach. The case, therefore, of *Hahn v. Corbet* opposes no difficulty. In that case the goods, according to the strictest definition of a total loss, or a partial loss as applicable to goods, had been totally lost. Here there was originally no total loss of the goods, but only a partial loss. Now there was undoubtedly afterwards, except as to 120 bags, a total loss of the goods, but with respect to a portion of the loss it was not by perils of the sea. I will not enlarge upon this point, for I could only repeat what has been said by my learned Brethren. The result seems to me to be clear, that the 1,000 bags were within the exception, and that the rest were lost by the perils of the sea.

“KEATING, J.—I am quite of the same opinion. The principal question, no doubt, as it has been put by the learned counsel for the defendants, is, What is the meaning and construction of the words used in the warranty, ‘free from all consequences of hostilities, riots, or commotion’?—and for the reasons that have been given, it seems to me that the intention of the parties was by that exception to warrant the freedom from all consequences of hostilities, riots, or commotion as a cause of the loss which occurred. That being so, it is admitted on all hands that the immediate cause of loss was the perils of the sea. Therefore, if the warranty is to be read in the way that I have stated, there can be no doubt

that, according to the universal construction of instruments of marine insurance, the cause intended must be taken to be the immediate or proximate cause of the loss; that is, the perils of the sea, and not the putting out the light at Cape Hatteras. I also agree with the rest of the Court, that the loss here ultimately is a partial loss. Mr. Mellish well expressed it when he said that as long as the coffee remained, as coffee, under the control of the captain and crew, and was capable of being saved, there could be no total loss. Taking the whole of that together, that seems to be correct; but as bearing on this case the observation arises that as to 5,380 bags, from the moment that the ship struck on the rock the coffee was no longer within the control of the captain and crew, with any capacity to be saved, or capable of being saved,—it was then and there lost presumably quite as much so as it was after it was [130] actually lost. As to the 1,000 bags which might have been saved, I have no doubt that their loss was as clearly occasioned by the consequence of hostilities as that the remainder, the 5,380, were lost by the perils of the sea. That being so, I come to the same conclusion that the rest of the Court have arrived at, that the verdict should be for the plaintiff as to the 5,380 bags, and as to the residue for the defendants.”

Whereupon, both parties rested.

The cause was thereupon argued by counsel for the respective parties, and thereupon the following proceedings were had:

Mr. CAMPBELL.—I request the Court to find as follows.

That said S. S. “Pleiades” was operated by the California-Atlantic Steamship Company, and, while on said voyage, with said insured cargo on board, on the 16th day of August, 1912, stranded on the coast of Mexico, and was thereafter released, and, with plaintiff’s said cargo still on board in an undamaged condition, returned to the port of San Francisco, where said cargo was stored in lighters, and said steamship was repaired, and, on the 27th day of December, 1912, was redelivered to the California-Atlantic Steamship Company; that said California-Atlantic Steamship Company went into bankruptcy about January 1st or 2d, 1913; that said steamship did not complete said voyage.

The Court thereupon denied said request and refused to make said finding, to which ruling of the Court defendant excepted and now assigns said exception to said ruling as Defendant’s Exception No. 7.

Mr. CAMPBELL.—I request the Court to find as follows:

That plaintiff reshipped said cargo in sound condition [131] from San Francisco to Balboa on the 15th day of October, 1912, on board the Steamer “Mackinaw,” operated by the California-Atlantic Steamship Company; that it was necessary to forward said cargo at that time because, under the contract of sale, if it was not delivered within a certain time plaintiff was subject to a penalty of one-tenth of one per cent. per day, and was liable to have the



shipment refused by the purchaser upon the condition that the contract of sale provided for such delivery within such time.

The Court thereupon denied said request and refused to make said finding, to which ruling of the Court defendant excepted and now assigns said exception to said ruling as Defendant's Exception No. 8.

Mr. CAMPBELL.—I request the Court to find as follows:

That the reshipment of said cargo from San Francisco to Balboa on board said Steamer "Mackinaw" was voluntary on the part of plaintiff, and was not caused by any perils insured against by said policy, but was made to avoid the penalties of the contract of sale of said cargo.

The Court thereupon denied said request and refused to make said finding, to which ruling of the Court defendant excepted and now assigns said exception to said ruling as Defendant's Exception No. 9.

Mr. CAMPBELL.—I request the Court to find as follows:

That at the time said cargo was reshipped on board said Steamer "Mackinaw," it was in a sound condition, as when originally shipped on board said Steamship "Pleiades," and was not in danger of loss or damage from any peril insured against [132] by said policy.

The Court thereupon denied said request and refused to make said finding, to which ruling of the Court defendant excepted and now assigns said ex-

ception to said ruling as Defendant's Exception No. 10.

Mr. CAMPBELL.—I request the Court to find as follows:

That it is and was at all times herein mentioned the law and custom of England that underwriters in issuing a policy of insurance on a cargo, of the form issued by defendant to plaintiff, do not contract with reference to the bill of lading on which the cargo is shipped, nor do such bills of lading become a part of the contract of insurance unless incorporated therein; that said bill of lading was not incorporated in said policy of insurance.

The COURT.—The insurance company is presumed to have understood that that would be under some form of affreightment.

Mr. CAMPBELL.—Undoubtedly so. It knew, as every other person knows, that any shipment—that is, it is a physical impossibility to ship the goods without either an express or written contract of affreightment, or an implied contract of affreightment, under the rules of liability of common carriers. It is a different proposition to say that because there is always a contract of affreightment in the case of shipment that we, the Insurance Company, are bound by whatever terms and conditions may be inserted in the bill of lading. For instance, if you should carry the California-Atlantic Steamship Company's bill of lading to its extreme, and I feel confident that Mr. Frank, [133] himself, did not believe in it, if he did he would not have brought the suit which he did bring in another court; if the

Steamship "Pleiades" had stranded on the beach outside the Cliff House, here, and had been released from that stranding and had been brought into the port of San Francisco and had been compelled to discharge her cargo for the purpose of a repair that would have only taken two weeks' time, under that bill of lading the California-Atlantic Steamship Company could have put that cargo on board another vessel, either of their own line or of another line, and have carried it forward to Balboa and have charged and collected a second freight for it. I know of no case that says that our policy is to be governed by clauses that may be inserted in a bill of lading,—so many of them that they must be printed in fine print upon the back, in type so fine that you cannot read them without a microscope.

The Court thereupon denied said request and refused to make said finding, to which ruling of the Court defendant excepted and now assigns said exception to said ruling as Defendant's Exception No. 11.

Mr. CAMPBELL.—I request the Court to find as follows:

That it is and was during all times herein mentioned the law of England that an underwriter is not liable, under a policy of marine insurance, for a loss which is not proximately caused by the perils insured against, and, where there is a succession of causes which must have existed in order to produce the loss, the last cause only must be looked to and the others rejected, although the result would not have been produced without them; that in cases of marine in-

surance only the *causa proxima* can be regarded.  
[134]

The Court thereupon denied said request and refused to make said finding, to which ruling of the Court defendant excepted and now assigns said exception to said ruling as Defendant's Exception No. 12.

Mr. CAMPBELL.—I request the Court to find as follows:

That it is and was during all times herein mentioned the law of England that an underwriter on a policy of marine insurance on cargo is not liable for losses resulting from delay in the transportation of the insured cargo.

The Court thereupon denied said request and refused to make said finding, to which ruling of the Court defendant excepted and now assigns said exception to said ruling as Defendant's Exception No. 13.

Mr. CAMPBELL.—I request the Court to find as follows:

That it is and was during all times herein mentioned the law of England that the voluntary reshipment of said cargo on said Steamer "Mackinaw" and the payment of said additional freight did not constitute a loss, charge or liability under the policy of insurance covering said cargo.

The Court thereupon denied said request and refused to make said finding, to which ruling of the Court defendant excepted and now assigns said exception to said ruling as Defendant's Exception No. 14.



Mr. CAMPBELL.—I request the Court to find as follows:

That it is and was during all times herein mentioned the law of England that the inability of plaintiff, by reason of the purpose for which said insured cargo was intended and the contract under which it was sold, to detain said insured cargo at [135] the port of San Francisco until the completion of the repairs to said S. S. "Pleiades," and to then forward it in said steamship to destination, did not make the additional freight paid by plaintiff for the reshipment of said cargo to destination by the Steamer "Mackinaw" a loss, charge or liability under the policy of insurance covering the said cargo, as it was not caused by any peril insured against.

The Court thereupon denied said request and refused to make said finding, to which ruling of the Court defendant excepted and now assigns said exception to said ruling as Defendant's Exception No. 15.

Mr. CAMPBELL.—I request the Court to find as follows:

That it is and was at all times herein mentioned the law of England that the inability of plaintiff, by reason of the nature of said cargo and the contract under which it was sold, to detain said cargo at the port of San Francisco until the completion of the repairs to said S. S. "Pleiades," and to then forward it to destination, did not make the additional freight paid by plaintiff for the reshipment of said cargo to destination by the Steamer "Mackinaw" a loss, charge or liability under the policy of insurance cov-

ering the said cargo, for it was not due to any peril insured against by said policy, but resulted from the nature of the contract of carriage entered into with the California-Atlantic Steamship Company, charterer of the S. S. "Pleiades," by which said original freight was prepaid, and was to be considered as earned, ship or goods lost or not lost at any stage of the entire transit. [136]

The Court thereupon denied said request and refused to make said finding, to which ruling of the Court defendant excepted and now assigns said exception to said ruling as Defendant's Exception No. 16.

Mr. CAMPBELL.—I request the Court to find as follows:

That it is and was during all times herein mentioned the law of England that expenses incurred by or on behalf of an assured, under a policy of marine insurance, for the safety or preservation of the subject-matter insured, other than general average and salvage charges, are particular charges, and that particular charges are not included in particular average; that expenses incurred in forwarding to destination goods insured under a policy of marine insurance are not particular average.

The Court thereupon denied said request and refused to make said finding, to which ruling of the Court defendant excepted and now assigns said exception to said ruling as Defendant's Exception No. 17.

Mr. CAMPBELL.—I request the Court to find as follows:

That it is and was during all times herein mentioned the law of England that particular charges are only recoverable from underwriters on a policy of marine insurance when incurred after the arising of a peril insured against in order to prevent such peril causing a loss for which the underwriters would be liable if it were so caused.

The Court thereupon denied said request and refused to make said finding, to which ruling of the Court defendant excepted and now assigns said exception to said ruling as Defendant's Exception No. 18. [137]

Mr. CAMPBELL.—I request the Court to find as follows:

That it is and was during all times herein mentioned the law of England that the facts that the nature of said cargo and the contract under which it was sold would render it impossible to detain said cargo at the port of San Francisco during the period required for the completion of the repairs to said S. S. "Pleiades," and then to forward it to destination, constituted facts material to the risk, and the concealment thereof from plaintiff at the time said policy of insurance was issued constituted the concealment of facts material to the risk and voided the policy.

The Court thereupon denied said request and refused to make said finding, to which ruling of the Court defendant excepted and now assigns said exception to said ruling as Defendant's Exception No. 19.

Mr. CAMPBELL.—I request the Court to find as follows:

That there is no substantial evidence to support a finding against the defendant.

The Court thereupon denied said request and refused to make said finding, to which ruling of the Court defendant excepted and now assigns said exception to said ruling as Defendant's Exception No. 20.

Mr. CAMPBELL.—I request the Court to find as follows:

That the substantial evidence will not support a judgment in favor of plaintiff.

The Court thereupon denied said request and refused to make said finding, to which ruling of the Court defendant excepted and now assigns said exception to said ruling as Defendant's Exception No. 21. [138]

Mr. CAMPBELL.—I request the Court to find as follows: That the substantial evidence will not support a judgment in favor of plaintiff.

The Court thereupon denied said request and refused to make said finding, to which ruling of the Court defendant excepted and now assigns said exception to said ruling as Defendant's Exception No. 22.

Mr. CAMPBELL.—I request the Court to find as follows: That the substantial evidence will not support a finding in favor of plaintiff.

The Court thereupon denied said request and refused to make said finding, to which ruling of the Court defendant excepted and now assigns said ex-



ception to said ruling as Defendant's Exception No. 23.

Mr. CAMPBELL.—I request the Court to find as follows: That there is no substantial evidence to support a judgment in favor of the plaintiff.

The Court thereupon denied said request and refused to make said finding, to which ruling of the Court defendant excepted and now assigns said exception to said ruling as Defendant's Exception No. 24.

Mr. CAMPBELL.—I now move the Court for a judgment for the defendant dismissing the complaint upon the ground that the substantial evidence supports such judgment.

The Court thereupon denied said motion and refused to dismiss the complaint, to which ruling of the Court defendant excepted and now assigns said exception to said ruling as Defendant's Exception No. 25. [139]

The Court thereupon proceeded to make its findings, and, among other things, found as follows, which said finding in the findings of fact of said Court is marked No. 2:

That said steamer "Pleiades" departed on her voyage in said policy mentioned, with said 6,000 cases of high explosives on board thereof, and while on said voyage was, on the 16th day of August, 1912, stranded off the coast of Mexico, and then and there, together with her cargo, was in danger of becoming a total loss; that the said plaintiff then and there abandoned said cargo to said defendant, which abandonment said defendant then and there refused to ac-

cept; that thereafter such salvage operations were undertaken as resulted in the floating and saving of said vessel and her cargo; that the said vessel was then and there in such damaged condition that she was unable to proceed upon her said voyage, but was brought back to the port of San Francisco for repairs, where the said cargo was discharged into lighters; that the said repairs on said vessel were not completed until December 27, 1912, and said steamer never resumed or otherwise performed said voyage, but said voyage was wholly abandoned by said steamer; that the nature of said goods, and the purpose for which said goods were intended, would have rendered it unreasonable to detain them until the completion of repairs.

To the making of the foregoing finding defendant objected upon the ground that there was no substantial evidence before the Court to support it.

The Court thereupon overruled defendant's objection, to which ruling defendant excepted, and now assigns said exception to said ruling as Defendant's Exception No. 26. [140]

The Court also found, among other things, as follows, which said finding in the findings of fact of said Court is marked No. 3:

That in order to transport the said cargo to its port of destination, the said plaintiff was compelled to, and did, on the 15th day of October, 1912, reship and forward the said cargo on the Steamer "Mackinaw" belonging to the said carrier California-Atlantic-Steamship Company, and transported said cargo therein from the port of San Francisco to the

port of Balboa, for which service the plaintiff was then and there compelled to pay, and did pay, additional freight in the sum of four thousand and fifty (4,050) dollars.

To the making of the foregoing finding defendant objected upon the ground that there was no substantial evidence before the Court to support it.

The Court thereupon overruled defendant's objection, to which ruling defendant excepted, and now assigns said exception to said ruling as Defendant's Exception No. 27.

The Court also found, among other things, as follows, which said finding in the findings of fact of said Court is marked No. 5:

That it is the law of England that if, by reason of damage done to the ship, she cannot be repaired without great loss of time, the master is at liberty to procure another ship to transport the cargo to the port of destination; that there is no absolute obligation on the part of the master towards the owner of the goods to forward them in the original ship. [141]

To the making of the foregoing finding defendant objected upon the ground that there was no substantial evidence before the Court to support it.

The Court thereupon overruled defendant's objection, to which ruling defendant excepted, and now assigns said exception to said ruling as Defendant's Exception No. 28.

The Court also found, among other things, as follows, which said finding in the findings of fact of said Court is marked No. 6:

That it is the law of England that where freight is

paid in advance, and the contract provides that it is to be considered as earned, vessel or goods lost or not lost at any stage of the entire transit, such freight is earned by the ship owner when the cargo is received on board, and the right of the ship owner thereto does not depend on the delivery of the cargo at the port of destination.

To the making of the foregoing finding defendant objected upon the ground that there was no substantial evidence before the Court to support it.

The Court thereupon overruled defendant's objection, to which ruling defendant excepted, and now assigns said exception to said ruling as Defendant's Exception No. 29.

The Court also found, among other things, as follows, which said finding in the findings of fact of said Court is marked No. 7:

That it is the law of England, that in case of marine insurance on merchandise, when, in consequence of a peril insured against, an extra freight must be paid by the cargo owner to [142] bring said merchandise to the port of destination, such expense is a loss directly due to such peril insured against, for which the insurer is liable.

To the making of the foregoing finding defendant objected upon the ground that there was no substantial evidence before the Court to support it.

The Court thereupon overruled defendant's objection, to which ruling defendant excepted, and now assigns said exception to said ruling as Defendant's Exception No. 30.

The Court also found, among other things, as fol-



lows, which said finding in the findings of fact of said Court is marked No. 8:

That under the policy and the facts admitted by the pleadings in the case at bar, in connection with the facts herein found by this Court, it is the practice and custom of underwriters in England to pay the excess of the expense to which the owner of the goods is put in bringing them to their destination over the freight originally paid, as a loss directly due to such peril.

To the making of the foregoing finding defendant objected upon the ground that there was no substantial evidence before the Court to support it.

The Court thereupon overruled defendant's objection, to which ruling defendant excepted, and now assigns said exception to said ruling as Defendant's Exception No. 31.

The Court also found, among other things, as follows, which said finding in the findings of fact of said Court is marked No. 9: [143]

That under the law of England, it was not the obligation of the carrier in consideration of the original freight, whether prepaid or not, to complete said voyage with said Steamer "Pleiades" upon the completion of the repairs to said steamer, necessitated by such stranding, and to transport the said cargo to its port of destination without requiring the payment of the second freight therefor.

To the making of the foregoing finding defendant objected upon the ground that there was no substantial evidence before the Court to support it.

The Court thereupon overruled defendant's objec-

tion, to which ruling defendant excepted, and now assigns said exception to said ruling as Defendant's Exception No. 32.

The Court also found, among other things, as follows, which said finding in the findings of fact of said Court is marked No. 10:

That the reshipment and forwarding of said cargo on said Steamer "Mackinaw" to said port of Balboa, and the payment of additional freight, were not voluntary on the part of the said plaintiff and were caused by perils of the sea insured against by said policy, and, under the laws of England, did constitute a loss, charge and liability under the terms and conditions of said policy.

To the making of the foregoing finding defendant objected upon the ground that there was no substantial evidence before the Court to support it.

The Court thereupon overruled defendant's objection, to which ruling defendant excepted, and now assigns said exception to said ruling as Defendant's Exception No. 33. [144]

The Court also found, among other things, as follows, which said finding in the findings of fact of said Court is marked No. 11:

That under the law of England, if by reason of the specific purpose for which said goods were intended, said goods could not be detained at said port of San Francisco until the completion of the repairs of said vessel and thence forwarded in said steamer to the port of destination, and if upon reshipment of said goods to destination an additional freight was paid by plaintiff, such extra freight did constitute a

loss, charge and liability under said policy, and was caused by perils insured against by said policy.

To the making of the foregoing finding defendant objected upon the ground that there was no substantial evidence before the Court to support it.

The Court thereupon overruled defendant's objection, to which ruling defendant excepted, and now assigns said exception to said ruling as Defendant's Exception No. 34.

The Court also found, among other things, as follows, which said finding in the findings of fact of said Court is marked No. 12:

That under the law of England the payment of said extra freight was due to a peril insured against by said policy, and resulted in a loss which said policy did cover.

To the making of the foregoing finding defendant objected upon the ground that there was no substantial evidence before the Court to support it.

The Court thereupon overruled defendant's objection, to which ruling defendant excepted, and now assigns said exception to said ruling as Defendant's Exception No. 35. [145]

The Court also found, among other things, as follows, which said finding in the findings of fact of said court is marked No. 13:

That under the law of England there was no concealment by the plaintiff from the defendant of facts material to the risk, and said policy was not voided.

To the making of the foregoing finding defendant objected upon the ground that there was no substantial evidence before the Court to support it.

The Court thereupon overruled defendant's objection, to which ruling defendant excepted, and now assigns said exception to said ruling as Defendant's Exception No. 36.

In addition to the foregoing findings, the Court also made the following findings, marked 1 and 4, respectively, as follows:

1. That the said cargo was being transported in the said Steamer "Pleiades" under a contract of carriage with the California-Atlantic Steamship Company, wherein and whereby it was provided that freight, whether prepared or to be collected, was to be considered as earned vessel or goods lost or not lost at any stage of the entire transit; that on the happening of any of the contingencies in said contract of carriage mentioned, said carriers were to have the right to forward said cargo to the port of destination on their own ships, and should receive extra compensation for such service, whether performed by their own vessels or those of strangers; that among the contingencies so provided in said bill of lading were stranding, straining, and any accidents or perils of the sea. That the said plaintiff had prepaid the freight for the carriage of [146] said cargo from the port of San Francisco to the port of Balboa, in the sum of Four Thousand Nine Hundred and Fifty (4,950) Dollars.

4. That the said plaintiff demanded payment of the said insurance company of the said sum so paid by it to forward the said cargo to said port of destination, but said defendant has refused to pay the same, or any part thereof, and no part thereof has been paid.



The Court then made an order, with the consent of plaintiff, that the defendant have twenty (20) days within which to propose its bill of exceptions herein, and that the time for the settlement of said bill of exceptions be carried over to the next term, to wit, the 1915 November term, of said Court. Thereafter, the parties entered into a stipulation extending defendant's time with which to serve its proposed bill of exceptions to and including the 14th day of December, 1915, and the Court made its order extending the said time pursuant to said stipulation.

Thereafter, and from time to time, the Court made its orders, with the consent of plaintiff, extending the time within which defendant might propose its bill of exceptions herein, and that the time for the settlement of said bill of exceptions be carried over from term to term, the last of which orders duly and regularly made, with the consent of plaintiff, carried the time and jurisdiction of said Court for the settlement of said bill of exceptions over to the present term in which it is now settled and allowed. [147]

The foregoing constitute all of the proceedings and all of the testimony offered and received on the trial of said action, and now, within the time required by law and the rules of this Court, said defendant proposes the foregoing as and for its bill of exceptions to the rulings of the Court made during the trial of the above-entitled action and to the decision of said Court, and prays that it may be settled and allowed as correct.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Attorneys for Defendant. [148]

**Stipulation as to the Correctness of the Bill of  
Exceptions.**

IT IS HEREBY STIPULATED AND AGREED that the above and foregoing constitutes a true and correct bill of exceptions in the above-entitled action, and that the same contains all of the proceedings had and all of the testimony offered and received on the trial of said action and all of the rulings of the Court made during the trial of said action, and that the same may be settled and allowed as and for the bill of exceptions to such rulings, and to the decisions of the Court herein.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Attorneys for Defendant.

NATHAN H. FRANK,

IRVING H. FRANK,

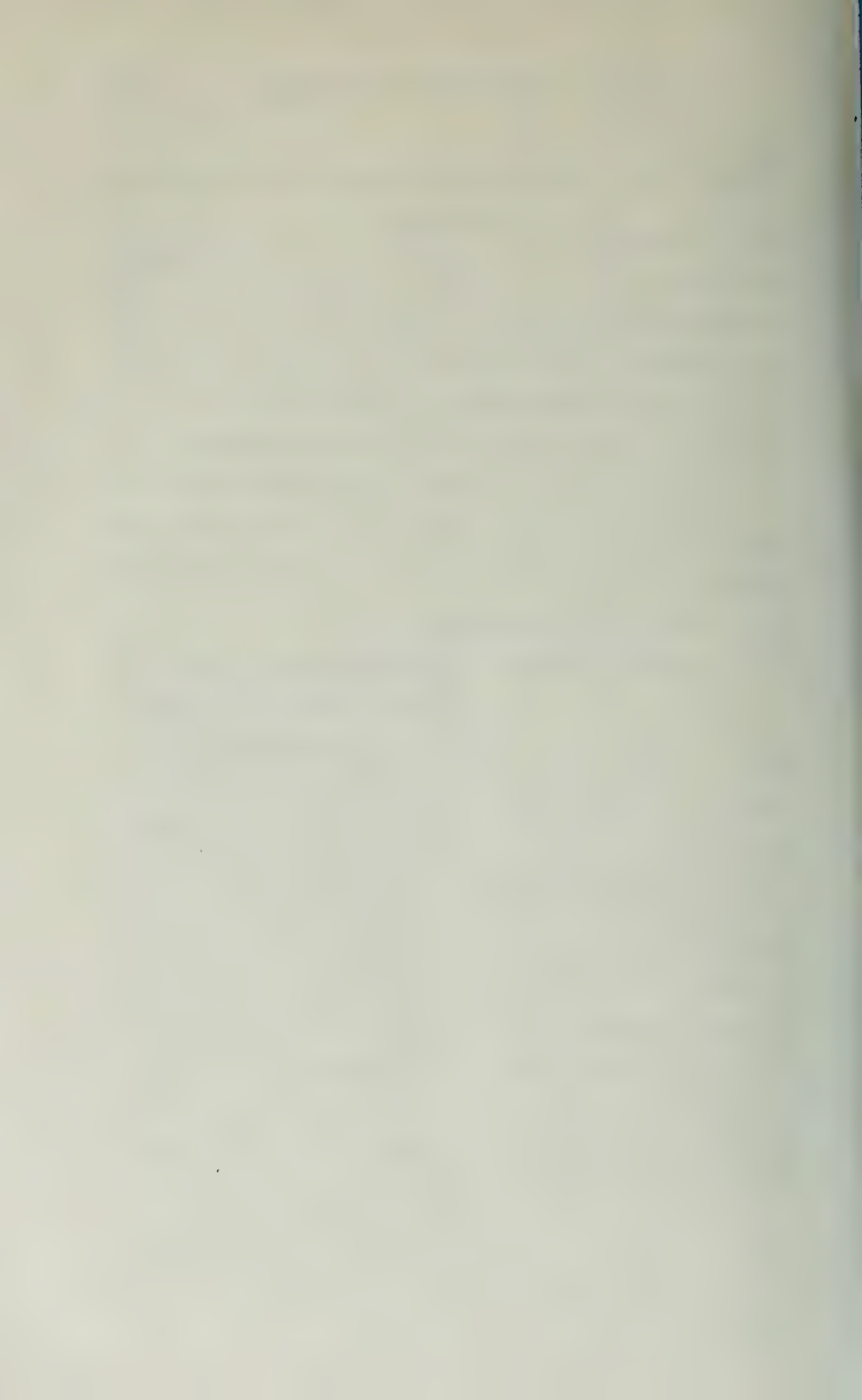
Attorneys for Plaintiff.

**Order Settling, etc., Bill of Exceptions.**

The foregoing bill of exceptions now being presented in due time and found to be correct, I do hereby certify that the said bill is a true bill of exceptions and contains all of the proceedings had and all of the testimony [149] offered and received on the trial of the said action and all of the rulings of the Court made during said trial and all of the exceptions of the respective parties hereto.

WM. C. VAN FLEET,

District Judge. [150]



ORIGINAL

CARGO—ENGLISH FORM

FIREMAN'S FUND INSURANCE COMPANY

SAN FRANCISCO, CALIFORNIA

All Policies issued abroad and made payable in the United Kingdom are required by law to have a Government Stamp of one penny per £100 affixed within ten days after date of receipt in the United Kingdom.

No. 307264

£ \$35,000

Warranted free of capture, seizure and detention and the consequences thereof or of any attempt therat piracy excepted and also from all consequences of riots, civil commotions, hostilities or warlike operations, whether before or after declaration of war.

It is hereby agreed that the rights of the assured shall not be prejudiced by the insertion in the bill of lading of the London conference rules of affrayment 1893, or of the following clause:

"The act of God, perils of the sea, fire, barraty of the master and crew, enemies, pirates, thieves, arrest, and restraint of princes, rulers and people, collisions, stranding and other accidents of navigation excepted, even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the ship-owners."

Warranted free from average unless general or the ship or craft be stranded, sunk or burnt, each craft or lighter being deemed a separate insurance.

Underwriters notwithstanding this warranty to pay for any damage caused by fire or by collision with any other ship or vessel or with ice or with any substance other than water and any special charges for warehouse rent, re-shipping or forwarding for which they would otherwise be liable, also to pay the insured value of any package or packages which may be totally lost in trans-shipment.

AND the said Company promises and agrees that the Insurance aforesaid shall commence upon the said Freight Goods and Merchandise from the time when the Goods and Merchandise shall be laden on board the said Ship or Vessel Craft or Boat as above and continue until the said Goods and Merchandise be discharged and safely landed at as above AND that it shall be lawful for the said Ship or Vessel in the Voyage so insured as aforesaid to proceed and sail to and touch and stay at any Ports or Places whatsoever without prejudice to this Insurance AND touching the Adventures and Perils which the said Company is content to bear and does take upon itself in the Voyage so insured as aforesaid they are of the Seas Men-of-War Fire Enemies Pirates Rovers Thieves Jettisons Letters of Mart and Counter Mart Surprizals Takings at Sea Arrests Restraints and Detainments of all Kings Princes and People of what Nation Condition or Quality sever Barraty of the Master and Mariners and of all other Perils Losses and Misfortunes that have or shall come to the Hurt Detriment or Damage of the aforesaid subject matter of this Insurance or any part thereof AND in case of any Loss or Misfortune it shall be lawful to the Insured their Factors Servants and Assigns to sue labour and travel for in and about the Defence Safeguard and Recovery of the aforesaid subject matter of this Insurance or any part thereof without prejudice to this Insurance the charges whereof the said Company will bear in proportion to the sum hereby insured AND (it is expressly declared and agreed that the acts of Insurer or Insured in Recovering Saving or Preserving the Property Insured shall not be considered a waiver or acceptance of abandonment) AND it is declared and agreed that Corn Fish Salt Saltpetre Fruit Flour Rice Seeds Hides Skins and Molasses shall be and are warranted free from average unless general or the Ship be stranded sunk or burnt or unless caused by collision with any other Ship or Vessel and that Sugar Tobacco Hemp and Flax shall be and are warranted free from average under Five Pounds per centum and that all other Goods and also Ship and Freight shall be and are warranted free from average under Three Pounds per centum unless general or the Ship be stranded sunk or burnt.

It is hereby understood and agreed that in case of claim for loss or damage to the interest insured under this policy same shall be reported as soon as goods are landed or loss known to Joseph Hadley Esq. No. 1 Cornhill E. C. London or Messrs. Brodric Leitch & Kendall No. B 18 Liverpool and London Chambers Liverpool; and that all claims hereunder shall be paid at the office of this Company in San Francisco or at the office of Messrs. Brown Shipley & Company London upon certificate of loss signed by Joseph Hadley Esq. or Messrs. Brodric Leitch & Kendall.

In Witness Whereof the FIREMAN'S FUND INSURANCE COMPANY has caused these presents to be signed by its duly authorized officers

in the CITY OF SAN FRANCISCO, STATE OF CALIFORNIA, this \_\_\_\_\_ day of \_\_\_\_\_ one thousand nine hundred and \_\_\_\_\_

Not valid unless countersigned by GEORGE E. BILLINGS, Marine Agent.

A. M. FOLLANSBEE, Jr.,  
Marine Secretary.

WM. J. DUTTON,  
President.

WHEREAS it hath been proposed to the FIREMAN'S FUND INSURANCE COMPANY by Trojan Powder Co.

as well in his or their own name as for and in the name and names of all and every other person or persons, to whom the subject matter of this policy does may or shall appertain in part or in all to make with the said Company the Insurance hereinafter mentioned and described.

Now this Policy Witnesseth that in consideration of the said person or persons effecting this Policy promising to pay to the said Company the sum of One Hundred & Seventy-Five and 00/100ths.....DOLLARS as a premium at and after the rate of ½% per cent for such Insurance the said Company takes upon itself the burden of such Insurance to the amount of Thirty Five Thousand and 00/100.....DOLLARS

and promises and agrees with the insured, their Executors, Administrators and Assigns in all respects truly to perform and fulfill the Contract contained in this Policy. AND it is hereby agreed and declared that the said Insurance shall be and is an Insurance (lost or not lost) at and from San Francisco Bay to Malacca.

AND it is also agreed and declared that the subject matter of this Policy as between the Assured and the said Company so far as concerns this Policy shall be and is as follows upon \$35,000—on 6000 cases High explosives.

the Ship or vessel called the Str. "Pleiades"

laden (under deck) on board

General average payable as per Foreign Statement or per York-Antwerp Rules of 1890 if in accordance with the Contract of Affrayment Warranted that should the vessel ground within the limits of the Columbia and/or Willamette and/or Fraser Rivers and/or Suez Canal and/or Manchester Ship Canal or its connections and/or in the River Mersey above Rock Ferry Slip, such grounding not to be deemed a stranding, but Underwriters to pay for any damage which may be proved to have directly resulted therefrom.

In the event of the vessel making any deviation or change of voyage, it is mutually agreed that such deviation or change shall be held covered at a premium to be arranged, provided due notice be given by the assured on receipt of advice of such deviation or change of voyage. Including risk of craft and boats to and from the ship or vessel each craft or boat to be deemed a separate risk.

All questions of liability arising under this policy are to be governed by the laws and customs of England. This Policy is issued in duplicate. Freight warranted free from any claim consequent upon loss of time whether arising from a peril of the sea or otherwise.

The preceding clauses and all clauses annexed hereto or stamped hereon shall control other printed conditions inconsistent with the same.



ENGLISH CARGO

FIREMAN'S FUND  
INSURANCE COMPANY

—OF—

SAN FRANCISCO, CALIFORNIA

---

No. 307264

Date August 7, 1912.

---

*Vessel*

Str. "Pleiades"

*Assured*

Trojan Powder Co.

---

£ \$35,000

at  $\frac{1}{2}$  %

%

£ \$175.—

---

Head Office, Company's Building  
California and Sansome Streets.

1981 1982

CALIFORNIA ATLANTIC  
STEAMSHIP CO.

(Home Reg) HAYES &amp; HENDERSON (H. Hayes) Agents

100

PANAMA RAILROAD CO.

In cooperation with other carriers on the route

1 4 4

1901 - 1902

Brought from the Press by the

110 1200

1000 1100 1200 1300 1400 1500 1600 1700 1800 1900 2000

1000000	One million	1000000	One million
100000	One hundred thousand	100000	One hundred thousand
10000	Ten thousand	10000	Ten thousand
1000	One thousand	1000	One thousand
100	One hundred	100	One hundred
10	Ten	10	Ten
1	One	1	One

10100

1899 14-10-11

1. Learning Objectives Page 1  
 2. Learning Objectives Page 2

1. Under weight and measurement subject to inspection, was found nothing to be considered equal to \$1.50. Found Mexico gold sovereigns, varying their value (weight is around 100) United States gold is represented by 1.50. When bought by the following countries is represented as above: The rest are 1 to the countries, Mexico, U.S., France, Prussia, Spain, Italy, etc. Spain is Spanish money of various sorts of the value.

V - 11 - 10

Handwritten text, likely a signature or name, appearing as "H. J. ...".

1891

High Fall

The Signature of the Agent here authenticates only the  
document described.

1894-1895

Stomach in margin. Dorsal

## Received by the CALIFORNIA-ATLANTIC STEAMSHIP CO.

At the end of the document

From The New Yorker : 1934

under the contract hereinafter contained the property contained herein specified as follows or as per margin (but measurements always accepted), in apparent good order and condition: weight, contents and value unknown. 117 -

1999

Total at San Francisco this 1978 Jan. 1 of August 1977:

## CONDITIONS OF THIS BILL OF LADING.

1. The carriers shall have liberty to transfer the goods to and transport them by lighters, barges, or any other vessel than that named, to lighter from steamer to steamer and from steamer to shore, or from shore to steamer, and shall have liberty to sail to and from pilots, to land and to load and to discharge at any wharf or wharves, or at any port or ports of call beyond, and to deviate, with like privilege to stop, to call at any port or ports of call beyond, and to deviate, with like privilege to stop. It is agreed that the goods may be lightered, ferried or carted to the consignee or a connecting carrier in Bay of Panama or elsewhere at the owner's risk. The Panama Railroad Company will not be responsible for loss or damage to goods or treasure from fire in cars, in warehouse, on wharf, or in lighter in the Bay of Panama.

2. No carrier shall be liable for delay, nor in any other respect than as warehouseman, while the said property awaits conveyance from any point of transshipment, and in case the whole or any part of the property specified herein be prevented by any cause from going from port in the first steamer of the line stated, leaving after the arrival of such property at the port, the carrier hereunder then in possession is at liberty to forward said property by succeeding steamer of said line, or, if deemed necessary by any other steamer or route.

[illegible]

4. All liability under this Bill of Lading shall be determined on the basis of the actual market value of the goods at the time of ship's entry at port of destination, but the Carriers shall not be liable for any value exceeding one hundred dollars (\$100.00) U. S. Gold upon each package, unless the value exceeds that amount, is so expressed in the Bill of Lading, and extra freight paid thereon, as per tariffs; and shipper covenants that such claims shall in no case exceed \$100 for loss of or damage to or for conversion of any one of said packages unless a greater package valuation be written hereon.

5. Explosive, inflammable, or other dangerous articles may be transported, if the carrier chooses, on deck or elsewhere, and they shall, in all cases, be at the owner's risk. If any such articles be secretly delivered to the carrier, the shipper shall be responsible for any damage resulting therefrom, and such articles may be destroyed by the carrier without incurring any liability therefor.

6. All articles named in this bill of lading are subject to charges for necessary cooperation and repairs. No liability shall exist for wrong carriage or delivery of goods damaged by water or imperfections in the goods, or for loss of or damage to goods arising from fire, theft, pilferage, or any other cause, or for loss of or damage to goods to be taken as proof of contributory negligence. Should it be found on the cargo being discharged that goods have been landed without marks or with marks differing from those on the bill of lading, the carrier shall be liable for the loss or damage apportioned to the different lots, and consignees shall conform to such allotment. All claims for damage to goods must be made and the nature and extent thereof fully disclosed, in the presence of the agent of the company, immediately after delivery of the goods, and the carrier shall be liable to pay the same, whether or upon the carrier which actually delivered the goods, within ten days after delivery, all claims for damage shall be taken to have been waived, and no further claim shall be allowed. The carrier shall be liable to recover the same. No agent or employee shall have authority to waive such demand.

7. Also that if a ship is prevented by Quarantine from reaching her destination, or making due delivery of the goods, or is detained at quarantine, the goods shall nevertheless be delivered as follows: The carrier shall cause the goods to be discharged into depots, lazarettos, hulks, crafts or lighters at the risk and expense of shipper, owner and consignee, all and any of them, and such discharge shall be deemed a full and final delivery of the goods, all risk, responsibility and expenses thereon being transferred to the shipper, owner and consignee; and thereafter the goods are delivered from the ship's tackle, and all expenses thereby or hereafter incurred, and all increased cost of such delivery shall be paid by shipper, owner and consignee, all and any of them, the carrier retaining a lien on the goods until he has received payment of the charges to be added to the freight charge; impracticable, or so in the master's opinion, the carrier may forthwith without previous notice proceed to the nearest safe port, or at ship's option to the nearest safe port, or whichever he may think fit, and there deliver the goods as aforesaid, and sign bills of lading for them, and there land the goods as if at the original port of discharge, at the risk and expense of shipper, owner and consignee, all and any of them, he and they paying freight from the original port of discharge, and thereon account of the cargo, and all expenses incurred, and all increased cost of delivery; and all risks, and expenses incurred thereafter shall be on account of shipper, owner and consignee. The several carriers shall have a lien upon the goods specified in this bill of lading for all sums due to them at the time of signing this bill of lading, and for interest on the goods. In case of loss, detriment or damage to the goods or delay in the transportation thereof, imposing any liability hereunder, the carrier in whose actual custody the goods were at the time of loss, detriment or damage, shall be the greatest responsible therefor. The receipt of any carrier for the goods shall be prima-facie evidence of the condition in which he received them in a suit against any other carrier. None of the carriers under this bill of lading will be responsible for deterioration or damage to cargo caused by fumigation, disinfection orders or sanitary authorities.

8. When the loading, transport, transshipment or delivery is prevented in consequence of ice, weather, epidemic, quarantine, sanitary measures, blockade, war, sedition, strikes, troubles, labor agitations, and all analogous circumstances whatever, the Captain, the Company or the Agents shall be entitled to load, discharge, retranship, put into warehouse or other place, or to sell, at their option, the cargo, or any part of the goods, whether the terminus of the voyage or not, and all risks whatsoever, and all expenses of transshipment or warehousing of Customs, including Surtaxe d'Entree Poi, and all extra expenses of whatsoever kind incurred in consequence of the above circumstances will be entirely for

account of the shipper, consignee or party claiming the goods; even though some part of such extra expenses may be occasioned by the fault of the Captain or ship-owner; the Master and Owner being discharged from all responsibility on the goods being placed in charge of the Custom House or any Mercantile Agent or Consul.

9. The goods shall be received by the owner or consignee at the station or wharf of the carrier at the ultimate point of delivery, in lots or parts of lots, and if not taken away within twenty-four hours after arrival may, at the option of the delivering carrier, be sent to a warehouse, or be permitted to lie where landed, all at the expense of the owner or consignee. If the owner or consignee fails to send a person at the ultimate point of delivery, immediately entitled to such delivery be disclosed by this bill of lading, the same must be furnished by the shipper, owner or consignee, in writing, to the terminal carrier, before the time at which in ordinary practice the goods would be taken away, and such failure to send a person to remove the goods within twenty-four hours after their arrival shall, in case of any subsequent loss of or injury to the latter, be treated as conclusive proof of negligence on the part of the shipper, owner or consignee, which contributed to such loss or injury. Negligence shall not be presumed as against any carrier who has exercised due diligence, and no liability shall exist therefore without actual and affirmative proof thereof.

10. If destination is a seaport, the ship may commence discharging immediately on arrival and discharge continuously, the Collector of the Port being hereby authorized to grant a general order for discharge immediately on arrival. Goods to be delivered at ship's tackle, and all charges from thence, including quays expenses, weighing, and delivering to be borne by consignee. If the goods are not to be landed at a seaport, or within such time as is provided by the regulations of the port of discharge, they may by the carrier be sent to store, permitted to lie there landed, or returned to the port of shipment, at the expense and risk of the owner, shipper or consignee.

11. Cargo for Onao to be delivered to the Custom House or Muella Darsena, under receipt, which receipt will relieve the carrier from all responsibility. Five shillings per ton extra will be charged on all goods landed by the Muella Darsena and on goods landed at the Custom House and the Muella Darsena. Goods consigned to the goods have left the steamer's tackle. In the other ports of South America, and in the ports of Central America and Mexico, the cargo will be discharged by the agent of the carrier, for the account and risk of owners of the goods, the landing receipts of the consignees of the goods, and the receipts of the carriers of the goods, be taken away by the consignee thereof immediately after the arrival of the steamer at the port of destination, or the same may be stored at the expense and risk of the consignee. In case of consignee of cargo carried forward to steamer's destination and landed after their return to account, and at the expense and risk of the consignee. In case the surf or state of the weather or other conditions upon the arrival of the steamer, shall be such as to render it, in the judgment of the carrier, inadvisable to land the cargo at the port of destination, the cargo may be from delay or neglect of the consignee, or other causes, the goods or any part thereof, be not transhipped, taken from alongside or landed at any port, the same may be discharged into quarantine depot, or into a lighter, hulk or craft, or be landed at any port, or may be stored at the expense and risk of the consignee, or retained on board, and be forwarded or delivered on a subsequent opportunity, in either case at the risk and expense of the consignee and/or owner of the goods. It is also expressly stipulated and agreed that the within described cargo shall not be landed at any port of destination, or be forwarded or delivered, or retained on board, and be forwarded or delivered on a subsequent opportunity, in either case at the risk and expense of the consignee and/or owner of the goods, and if the consignees fail to obtain this, the cargo shall be conveyed back to Ancon for the account and risk at regular through rates. It is understood and agreed that all charges demanded by the steamer company for landing goods, to be paid by the consignee. The steamer company is not responsible in respect of goods for France for any Surtaxe d'Entree Pot. In the event of the goods being consigned with option of delivery at another port or ports, the consignee shall be responsible for the cargo at the port of destination to be declared at the first of said ports called at by the steamer, within one hour from the time of the steamer's arrival at that port. Failing such declaration, the carriers reserve to themselves the right to discharge the goods at the port of arrival, and the consignee therefor, to be at the risk and expense of the consignee or owners of the goods.

12. In case of a blockade or interdict of the port of delivery or transshipment, or if, without such blockade or interdict, the entering of the port should be considered by the Master unsafe by reason of disease, war, or disturbances, he is authorized to go to the nearest port of refuge, and to discharge the cargo at such port of refuge, at shipper's or consignee's risk and expense, and on the goods being placed in charge of the Custom House or any mercantile agent or consul, and a letter being put into the post addressed to the shipper or consignee if named, stating the cause of the discharge, and the goods being discharged at the shipper's risk and expense, and the master and owner discharged from all responsibility. The California-Atlantic Steamship Company reserves the right, in event of any trouble arising between the Company and any of the Central American Republics, to discharge the cargo at any port of refuge, and to forward the same to the port of destination, at any time as it may be convenient to carry the same forward for delivery.

18. Carrier shall have a lien on said property for all fines imposed on it and for all expense to it resulting from shipper's failure to furnish proper Consular or Custom House papers in due time or resulting from other errors or omissions of shippers, and all such fines and expenses shall be reimbursed to Carrier by consignee before said property shall be delivered to him.

14. It is agreed that the property covered by this bill of lading is subject to all conditions expressed in the regular forms of bills of lading in use by the connecting steamship company at time of shipment, and to all local rules and regulations at port of destination not expressly provided for by the clauses herein.

16. It is agreed that this bill of lading, duly endorsed, shall be given up to the last carrier, if required, in exchange for delivery order.

18. That merchandise on wharf or in warehouse awaiting shipment, transshipment or delivery be at owner's risk of loss or damage by fire, flood and/or the giving away or falling or destruction in whole or part of the warehouse or the wharf or any structure thereon, not happening through the fault or negligence of carrier or representative.

17. It is expressly stipulated and agreed that the California-Atlantic Steamship Company shall not be liable for destruction of or damage to goods by fire while upon its vessel, or before loading thereon or after unloading the same therefrom, unless such fire is caused by the design or neglect of said Company.

18. In the event of any Cargo being accepted and carried with freight charges to collect at destination, and if through insufficiency of containers or any other cause whatsoever, such Cargo or any part thereof is refused by the connecting carriers, and the Carrier having such Cargo in possession at the time of such refusal is compelled to return the same to the port of origin or otherwise dispose of the same, all freight and other charges and all expenses of every nature whatsoever, incurred by the Carrier in connection with the return of such Cargo, shall be a charge and lien upon and against said Cargo, payable by the Shipper, Owner and/or Consignees, prior to taking delivery or effecting reshipment.

19. It is further mutually agreed that all questions arising under this bill of lading are to be governed by the laws of the country of the carrier to whose acts such questions are attributable.



**Plaintiff's Exhibit No. 3—Notice of Abandonment  
August 29, 1912, Trojan Powder Co. to  
Fireman's Fund Insurance Co.**

PLAINTIFF'S EXHIBIT No. 3.

NOTICE OF ABANDONMENT.

To the Fireman's Fund Insurance Company of  
San Francisco.

Gentlemen:—

Please take notice: That the Trojan Powder Company insured in the sum of Thirty-five Thousand 00/100 Dollars under your policy No. 307264, dated August 7th, 1912, on Six Thousand cases High Explosives laden on board the Ship or vessel called the Steamer "Pleiades," hereby abandons the said Six Thousand cases High Explosives laden on said vessel to your Company and claims of you as for a total loss under said policy.

The foregoing abandonment is made because the said Steamer "Pleiades" laden with said explosives on or about the 16th day of August, 1912, while on a voyage from San Francisco Bay to Balboa was wrecked at or near Cape San Lazaro—Lower California as the result of which the said Six Thousand cases of High Explosives became and are a total loss.

Dated, San Francisco, August 29, 1912.

TROJAN POWDER COMPANY,

By W. P. Mulhern,

Manager.

[Endorsed]: Filed Jul. 30, 1917. Walter B. Mal-  
ing, Clerk. [153]



*In the District Court of the United States, in and for  
the Northern District of California, Second Di-  
vision.*

No. 15,660.

TROJAN POWDER COMPANY, a Corporation,  
Plaintiff,

vs.

FIREMAN'S FUND INSURANCE COMPANY,  
a Corporation,  
Defendant.

**Petition for Allowance of Writ of Error.**

Fireman's Fund Insurance Company, a corporation, defendant in the above-entitled cause, feeling itself aggrieved by the decision of the court and the judgment entered herein on the 21st day of October, 1915, comes now by Ira A. Campbell, its attorney, and petitions said court for an order allowing said defendant to prosecute a writ of error to the Honorable the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the said defendant shall give and furnish upon such writ of error, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error by the said United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner will ever pray.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Attorneys for Defendant and Petitioner.

[Endorsed]: Filed Dec. 17, 1915. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [154]

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*In the District Court of the United States, in and for  
the Northern District of California, Second Di-  
vision.*

No. 15,660.

TROJAN POWDER COMPANY, a Corporation,  
Plaintiff,

vs.

FIREMAN'S FUND INSURANCE COMPANY,  
a Corporation,

Defendant.

**Assignment of Errors.**

Comes now Fireman's Fund Insurance Company, a corporation, defendant herein, and makes and files the following assignment of errors upon which it will rely in the prosecution of its writ of error in the above-entitled cause.

I.

The above-entitled court erred in holding and deciding that plaintiff was entitled to a judgment in the sum of \$4,050, and interest from the 15th day of October, 1912.

II.

The above-entitled court erred in holding and deciding that the steamer "Pleiades" never resumed,

or otherwise performed, her voyage, and that the said voyage was wholly abandoned by said steamer.

### III.

The above-entitled court erred in holding and deciding that the nature of the goods in question and the purposes for which said goods were intended would have rendered it unreasonable to have detained said goods until the completion of repairs.

### IV.

The above-entitled court erred in holding and deciding that because of a peril insured against by said defendant, the plaintiff was compelled to reship and forward the cargo in question [155] on the steamer "Mackinaw," belonging to the California-Atlantic Steamship Company, and pay therefor additional freight in the sum of \$4,050.

### V.

The above-entitled court erred in holding and deciding that the additional freight paid by said plaintiff to the said carrier, California-Atlantic Steamship Company, for the transportation of said cargo to destination was caused and occasioned by the terms of a contract entered into by and between said carrier and plaintiff of which contract said defendant had no notice.

### VI.

The above-entitled court erred in holding and deciding that it is the law of England that in case of marine insurance on merchandise, when in consequence of a peril insured against, an extra freight must be paid by the cargo owner to bring said merchandise to the port of destination, such expense is a

loss directly due to such peril insured against for which the insurer is liable.

## VII.

The above-entitled court erred in holding and deciding that under the policy and the facts admitted by the pleadings in this cause, in connection with the facts found by said court, it is the practice and custom of underwriters in England to pay the excess of the expense to which the owner of the goods is put in bringing them to their destination over the freight originally paid as a loss directly due to such peril.

## VIII.

The above-entitled court erred in not holding and deciding that because of the fact that the original freight paid by said plaintiff for the carriage of said cargo to destination was \$4,950, and the second freight paid by said plaintiff for the transportation of said cargo to destination was the sum of \$4,050, there was no excess [156] of freight paid by plaintiff over and above the expense necessary to carry said cargo to destination if no peril had intervened.

## IX.

The above-entitled Court erred in holding and deciding that under the law of England, it was the obligation of the carrier, in consideration of the original freight, whether prepaid or not, to complete said voyage with said steamer "Pleiades" upon the completion of the repairs to said steamer necessitated by such stranding and to transport the said cargo to its port of destination without requiring



the payment of the second freight therefor.

X.

The above-entitled Court erred in holding and deciding that the reshipment and forwarding of said cargo on said steamer "Mackinaw" to said port of Balboa, and the payment of additional freight were not voluntary on the part of said plaintiff, and were caused by perils of the sea insured against by said policy and under the law of England did constitute a loss, charge and liability under the terms and conditions of said policy.

XI.

The above-entitled Court erred in not holding and deciding that the payment of a second freight to the said carrier for a transshipment and forwarding of said cargo to destination in another vessel was caused by the provisions of the contract entered into by and between the plaintiff and the purchaser of said cargo, of which said contract defendant had no notice.

XII.

The above-entitled Court erred in holding and deciding that under the law of England, if by reason of the specific purpose for which said goods were intended, said goods could not be detained at said port of San Francisco until the completion of the repairs [157] of said vessel, and hence forwarded in said steamer to said port of destination, and if upon reshipment of said goods to destination, an additional freight was paid by plaintiff, such extra freight did constitute a loss, charge and liability

under said policy, and was caused by perils insured against by said policy.

### XIII.

The above-entitled Court erred in holding and deciding that under the law of England the payment of said extra freight was due to a peril insured against by said policy and resulted in a loss which said policy did cover.

### XIV.

The above-entitled Court erred in holding and deciding that under the law of England there was no concealment by the plaintiff from the defendant of the facts material to the risk, and said policy was not voided.

### XV.

The above-entitled Court erred in not holding and deciding that the stranding of the S. S. "Pleiades" was not the proximate cause of the second or additional payment of freight by said plaintiff to the said California-Atlantic Steamship Company.

### XVI.

The above-entitled Court erred in not holding and deciding, and in refusing to find as requested by defendant, that the S. S. "Pleiades" was operated by the California-Atlantic Steamship Company, and while on said voyage with said insured cargo on board, and on the 16th day of August, 1912, stranded on the coast of Mexico, and was thereafter released with plaintiff's said cargo still on board in an undamaged condition, and returned to the port of San Francisco, where said cargo was stored in lighters,

said steamship was repaired, and on the 27th day of December, 1912, was redelivered to the California-Atlantic Steamship Company; that said California-Atlantic [158] Steamship Company went into bankruptcy about January first or second, 1913; that said steamship did not complete said voyage, which said request to so find is set forth in defendant's exception No. 6.

### XVII.

The above-entitled Court erred in not holding and deciding, and in refusing to find as requested by defendant, that plaintiff reshipped said cargo in sound condition from San Francisco to Balboa on the 15th day of October, 1912, on board the steamer "Mackinaw," operated by the California-Atlantic Steamship Company; that it was necessary to forward said cargo at that time because, under the contract of sale if it were not delivered within a certain time, plaintiff was subject to a penalty of one-tenth of one per cent per day, and was liable to have the shipment refused by the purchaser upon the condition that the contract of sale provided for such delivery within such time, which said request to so find is set forth in defendant's exception No. 7.

### XVIII.

The above-entitled Court erred in not holding and deciding, and in refusing to find as requested by defendant, that the reshipment of said cargo from San Francisco to Balboa on board the steamer "Mackinaw" was voluntary on the part of plaintiff, and was not caused by any perils insured against

by said policy, but was made to avoid the penalties of the contract of sale of said cargo, which said request to so find is set forth in defendant's exception No. 8.

### XIX.

The above-entitled Court erred in not holding and deciding, and in refusing to find as requested by defendant, that at the time said cargo was reshipped on board said steamer "Mackinaw" [159] it was in as sound condition as when originally shipped on board said steamship "Pleiades," and was not in danger of loss or damage from any peril insured against by said policy, which said request to so find is set forth in defendant's exception No. 9.

### XX.

The above-entitled Court erred in not holding and deciding, and in refusing to find as requested by defendant, that it is and was at all times herein mentioned the law and custom of England that underwriters in issuing a policy of insurance on a cargo, of the form issued by defendant to plaintiff, do not contract with reference to the bill of lading on which the cargo is shipped, nor do such bills of lading become a part of the contract of insurance unless incorporated therein; that said bill of lading was not incorporated in said policy of insurance, which said request to so find is set forth in defendant's exception No. 10.

### XXI.

The above-entitled Court erred in not holding and deciding, and in refusing to find as requested by de-



fendant, that it is and was during all times herein mentioned the law of England that an underwriter is not liable, under a policy of marine insurance, for a loss which is not proximately caused by the perils insured against, and, that where there is a succession of causes which must have existed in order to produce the loss, the last cause only must be looked to and the others rejected, although the result would not have been produced without them; that in cases of marine insurance only the *causa proxima* can be regarded, which said request to so find is set forth in defendant's exception No. 11.

## XXII.

The above-entitled Court erred in not holding and deciding, and in refusing to find as requested by defendant, that it is and was during all times herein mentioned the law of England that [160] an underwriter on a policy of marine insurance on cargo is not liable for losses resulting from delay in the transportation of the insured cargo, which said request to so find is set forth in defendant's exception No. 12.

## XXIV.

The above-entitled Court erred in not holding and deciding, and in refusing to find as requested by defendant, that it is and was during all the times herein mentioned the law of England that the voluntary reshipment of said cargo on said steamer "Mackinaw" and the payment of said additional freight did not constitute a loss, charge or liability under the policy of insurance covering said cargo,

which said request so to find is set forth in defendant's exception No. 13.

## XXV.

The above-entitled Court erred in not holding and deciding, and in refusing to find as requested by defendant, that it is and was during all times herein mentioned the law of England that the inability of plaintiff, by reason of the purpose for which said insured cargo was intended and the contract under which it was sold, to detain said insured cargo at the port of San Francisco until the completion of the repairs to said S. S. "Pleiades," and to then forward it in said steamship to destination, did not make the additional freight paid by plaintiff for the reshipment of said cargo to destination by the steamer "Mackinaw" a loss, charge or liability under the policy of insurance covering the said cargo, as it was not caused by any peril insured against, which said request to so find is set forth in defendant's exception No. 14.

## XXVI.

The above-entitled Court erred in not holding and deciding, and in refusing to find as requested by defendant, that it is and was at all times herein mentioned the law of England that [161] the inability of plaintiff, by reason of the nature of said cargo and the contract under which it was sold, to detain said cargo at the port of San Francisco until the completion of the repairs to said S. S. "Pleiades," and to then forward it to destination, did not make the additional freight paid by plaintiff for the re-

shipment of the said cargo to destination by the steamer "Mackinaw" a loss, charge or liability under the policy of insurance covering the said cargo, for it was not due to any peril insured against by said policy, but resulted from the nature of the contract of carriage entered into with the California-Atlantic Steamship Company, charterer of the S. S. "Pleiades," by which said original freight was prepaid, and was to be considered as earned, ship or goods lost or not lost at any stage of the entire transit, which said request to so find is set forth in defendant's exception No. 15.

## XXVII.

The above-entitled Court erred in not holding and deciding, and in refusing to find as requested by defendant, that it is and was during all times herein mentioned the law of England that expenses incurred by or on behalf of an assured, under a policy of marine insurance, for the safety or preservation of the subject matter insured, other than general average and salvage charges, are particular charges, and that particular charges are not included in general average; that expenses incurred in forwarding to destination goods insured under a policy of marine insurance are not particular average, which said request to so find is set forth in defendant's exception No. 16.

## XXVIII.

The above-entitled Court erred in not holding and deciding, and in refusing to find as requested by defendant, that it is and was during all times herein

mentioned the law of England that [162] particular charges are only recoverable from underwriters on a policy of marine insurance when incurred after the arising of a peril insured against in order to prevent such peril causing a loss for which the underwriters would be liable if it were so caused, which said request to so find is set forth in defendant's exception No. 17.

### XXIX.

The above-entitled court erred in holding and deciding, and in refusing to find as requested by defendant, that it is and was during all the times herein mentioned the law of England that the facts that the nature of said cargo and the contents under which it was sold would render it impossible to detain said cargo at the port of San Francisco during the period required for the completion of the repairs to said S. S. "Pleiades," and to then forward it to destination, constituted facts material to the risk, and the concealment thereof from plaintiff at the time said policy of insurance was issued constituted the concealment of fact material to the risk and voided the policy, which said request to so find is set forth in defendant's exception No. 18.

### XXX.

The above-entitled court erred in refusing to make a finding, as requested by defendant, that there is no substantial evidence to support a finding against defendant as set forth in defendant's exception No. 19.

### XXXI.

The above-entitled court erred in refusing to make a finding, as requested by defendant, that there is no



substantial evidence to support a judgment against defendant as set forth in defendant's exception No. 20.

## XXXII.

The above-entitled court erred in refusing to make a [163] finding, as requested by defendant, that the substantial evidence will not support a judgment in favor of plaintiff as set forth in defendant's exception No. 21.

## XXXIII.

The above-entitled court erred in refusing to make a finding, as requested by defendant, that the substantial evidence will not support a finding in favor of plaintiff as set forth in defendant's exception No. 22.

## XXXIV.

The above-entitled court erred in refusing to make a finding, as requested by defendant, that there is no substantial evidence to support a judgment in favor of the plaintiff as set forth in defendant's exception No. 23.

## XXXV.

The above-entitled court erred in denying the motion of defendant for an order dismissing the complaint, which motion was made upon the ground that the substantial evidence supports such order or judgment as set forth in defendant's exception No. 24.

## XXXVI.

The above-entitled court erred in overruling defendant's objection to the offer by plaintiff of the contract of affreightment upon the ground that said contract of affreightment is incompetent, irrelevant

and immaterial and not binding upon the Insurance Company in any of the matters which are affected by the issues in this case, which said objection is more particularly referred to by defendant's exception No. 1.

## XXXVII.

The above-entitled court erred in overruling defendant's objection to the question propounded to the witness W. P. Mulhern covered by defendant's exception No. 2, as follows: [164]

“Q. Do you know whether the vessel ever went out on that voyage?

Mr. CAMPBELL.—We object to that question as being irrelevant and immaterial.”

The Court thereupon overruled defendant's said objection, to which defendant excepted, and defendant now assigns said exception to said ruling as defendant's exception No. 2.

## XXXVIII.

The above-entitled court erred in overruling defendant's objection to the offer by plaintiff of the notice of abandonment, and in refusing to strike out said notice of abandonment, which said objection and motion is more particularly referred to by defendant's exception No. 3.

## XXXIX.

The above-entitled court erred in overruling defendant's objection to the admission in evidence of the case of Pophan v. St. Petersburg Insurance Company, 10 Com. Cas. 31, upon the ground that said case is founded upon a form of policy which contains an express clause covering forwarding charges, the

clause in the policy in question being entirely distinct and different from the clause in the policy now under consideration, to which order in overruling said objection defendant excepted and now assigns said exception to said ruling as defendant's exception No. 4.

## XL.

The above-entitled court erred in denying defendant's motion to strike out the evidence contained in the case of Pophan v. St. Petersburg Insurance Company, 10 Com. Cas. 31, which motion was made upon the grounds that the said case is immaterial, irrelevant and incompetent because the policy in said case contained a clause expressly covering forwarding, landing and warehouse expenses, which said motion is more particularly referred to by defendant's exception No. 5. [165]

## XLI.

The above-entitled court erred in denying defendant's motion to strike out the evidence contained in the case of Pophan v. St. Petersburg Insurance Company, 10 Com. Cas. 276, which motion was made upon the ground that the said case is immaterial, irrelevant and incompetent because the policy in said case contained a clause expressly covering forwarding, landing and warehouse expenses, which said motion is more particularly referred to by defendant's exception No. 25.

## XLII.

The above-entitled court erred in overruling defendant's objection to the court making the finding that said steamer "Pleiades" departed on her voy-

age in said policy mentioned, with said 6,000 cases of high explosives on board thereof, and while on said voyage, was on the 16th day of August, 1912, stranded off the coast of Mexico, and then and there, together with her cargo, was in danger of becoming a total loss; that the said plaintiff then and there abandoned said cargo to said defendant, which abandonment said defendant then and there refused to accept; that thereafter such salvage operations were undertaken as resulted in the floating and saving of said vessel and her cargo; that the said vessel was then and there in such damaged condition that she was unable to proceed upon her said voyage, but was brought back to the port of San Francisco for repairs, where the said cargo was discharged into lighters; that the said repairs on said vessel were not completed until December 27, 1912, and said steamer never resumed or otherwise performed said voyage, but said voyage was wholly abandoned by said steamer; that the nature of said goods, and the purpose for which said goods were intended, would have rendered it unreasonable to detain them until the completion of repairs, [166] which said objection is more particularly referred to by defendant's exception No. 26.

### XLIII.

The above-entitled court erred in overruling defendant's objection to the court making the finding that in order to transport the said cargo to its port of destination, the said plaintiff was compelled to, and did, on the 15th day of October, 1912, reship and forward the said cargo on the Steamer "Mackinaw"



belonging to the said carrier California-Atlantic Steamship Company, and transported said cargo therein from the port of San Francisco to the port of Balboa, for which service the said plaintiff was then and there compelled to, and did pay, additional freight in the sum of Four Thousand and Fifty (4,050) Dollars, which said objection is more particularly referred to by defendant's Exception No. 27.

#### XLIV.

The above-entitled court erred in overruling defendant's objection to the court making the finding that it is the law of England that if, by reason of damage done to the ship, she cannot be repaired without great loss of time, the master is at liberty to procure another ship to transport the cargo to the port of destination; that there is no absolute obligation on the part of the master towards the owner of the goods to forward them in the original ship, which said objection is more particularly referred to by defendant's exception No. 28.

#### XLV.

The above-entitled court erred in overruling defendant's objection to the court making the finding that it is the law of England that where freight is paid in advance, and the contract provides that it is to be considered as earned, vessel or goods [167] lost or not lost at any stage of the entire transit, such freight is earned by the ship owner when the cargo is received on board, and the right of the ship owner thereto does not depend on the delivery of the cargo at the port of destination, which said objection is

more particularly referred to by defendant's exception No. 29.

#### XLVI.

The above-entitled court erred in overruling defendant's objection to the court making the finding that it is the law of England, that in case of marine insurance on merchandise, when, in consequence of a peril insured against, an extra freight must be paid by the cargo owner to bring said merchandise to the port of destination, such expense is a loss directly due to such peril insured against for which the insurer is liable, which said objection is more particularly referred to by defendant's exception No. 30.

#### XLVII.

The above-entitled court erred in overruling defendant's objection to the court making the finding that under the policy and the facts admitted by the pleading in the case at bar, in connection with the facts herein found by this court, it is the practice and custom of underwriters in England to pay the excess of the expense to which the owner of the goods is put in bringing them to their destination over the freight originally paid, as a loss directly due to such perils, which said objection is more particularly referred to by defendant's exception No. 31.

#### XLVIII.

The above-entitled court erred in overruling defendant's objection to the court making the finding that under the law of England, it was not the obligation of the carrier in consideration of the original freight whether prepaid or not, to complete said [168] voyage with said Steamer "Pleiades" upon the completion of the repairs to said steamer necessi-

tated by such stranding and to transport the said cargo to its port of destination without requiring the payment of the second freight therefor, which said objection is more particularly referred to by defendant's exception No. 32.

#### XLIX.

The above-entitled court erred in overruling defendant's objection to the court making the finding that the reshipment and forwarding of said cargo on said steamer "Mackinaw" to said port of Balboa, and the payment of additional freight, were not voluntary on the part of said plaintiff, and were caused by perils of the sea insured against by said policy, and under the laws of England did constitute a loss, charge and liability under the terms and conditions of said policy, which said objection is more particularly referred to by defendant's exception No. 33.

#### L.

The above-entitled court erred in overruling defendant's objection to the court making the finding that under the law of England, if, by reason of the specific purpose for which said goods were intended, said goods could not be detained at said port of San Francisco until the completion of the repairs of said vessel, and thence forwarded in said steamer to the port of destination, and if upon reshipment of said goods to destination an additional freight was paid by plaintiff, such extra freight did constitute a loss, charge and liability under said policy, and was caused by perils insured against by said policy, which said objection is more particularly referred to by defendant's exception No. 34.

LI.

The above-entitled court erred in overruling defendant's objection to the court making the finding that, under the law of [169] England, the payment of said extra freight was due to a peril insured against by said policy, and resulted in a loss which said policy did cover, which said objection is more particularly referred to by defendant's exception No. 35.

LII.

The above-entitled court erred in overruling defendant's objection to the court making the finding that, under the law of England, there was no concealment by the plaintiff from the defendant of facts material to the risk, and said policy was not voided, which said objection is more particularly referred to by defendant's exception No. 36.

WHEREFORE, the defendant and plaintiff in error herein prays that the judgment of the above-entitled court be reversed.

Dated: San Francisco, December 14, 1915.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Attorneys for Defendant and Plaintiff in Error.

[Endorsed]: Filed Dec. 17, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [170]



*In the District Court of the United States, in and  
for the Northern District of California, Second  
Division.*

No. 15,660.

TROJAN POWDER COMPANY, a Corporation,  
Plaintiff,

vs.

FIREMAN'S FUND INSURANCE COMPANY, a  
Corporation,  
Defendant.

**Order Allowing Writ of Error.**

Upon motion of Ira A. Campbell, Esq., attorney for the above-named defendant, and upon filing a petition for a writ of error and an assignment of errors,

IT IS ORDERED that a writ of error be and it is hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit the judgment heretofore entered herein, and that the amount of bond on said writ of error be and the same is hereby fixed at Seven Thousand Five Hundred & no/100 (\$7,500) Dollars, said bond to serve as a cost bond and a supersedeas bond on said writ of error.

WM. C. VAN FLEET,  
District Judge.

[Endorsed]: Filed Dec. 17, 1915. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [171]

*In the District Court of the United States, in and  
for the Northern District of California, Second  
Division.*

No. 15,660.

TROJAN POWDER COMPANY, a Corporation,  
Plaintiff,

vs.

FIREMAN'S FUND INSURANCE COMPANY, a  
Corporation,

Defendant.

**Bond on Writ of Error.**

KNOW ALL MEN BY THESE PRESENTS:

That we, Fireman's Fund Insurance Company, a corporation, as principal, and Fidelity and Deposit Company of Maryland, a corporation organized under the laws of the State of Maryland, as surety, are held and firmly bound unto Trojan Powder Company, a corporation, plaintiff, in the above-entitled action, in the full and just sum of Seven Thousand Five Hundred & no/100 (\$7,500) Dollars, lawful money of the United States, to be paid to said plaintiff, Trojan Powder Company, a corporation, to which payment well and truly to be made we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, successors, representatives and assigns, firmly by these presents.

Sealed with our seals and dated this 17th day of December, 1915.

WHEREAS the above-named defendant, Fireman's Fund Insurance Company, a corporation, has sued out a writ of error in the United States Circuit

Court of Appeals in and for the Ninth Circuit, to reverse the judgment entered in the above-entitled action in favor of the plaintiff therein, and against the defendant therein, for the sum of Four Thousand and Fifty (4050) Dollars, interest and costs.

NOW, THEREFORE, the condition of this obligation is such that if the above-named Fireman's Fund Insurance Company, a corporation, [172] shall prosecute such writ of error to effect and answer all damages and costs if it shall fail to make good said plea, then this obligation shall be void, otherwise to remain in full force and effect.

IN WITNESS WHEREOF said Fireman's Fund Insurance Company, a corporation, has caused its name to be hereunto subscribed and its corporate seal to be hereunto affixed by its officers thereunto duly authorized, and said Fidelity and Deposit Company of Maryland, has caused its name to be hereunto subscribed and its corporate seal to be hereunto affixed by its officers thereunto duly authorized, this 17th day of December, 1915.

[Seal]

FIREMAN'S FUND INSURANCE COM-  
PANY,

By W. A. FOLLANSBEE, Jr.,  
Marine Secretary.

FIDELITY AND DEPOSIT COMPANY  
OF MARYLAND,

By GUY LEROY STEVICK, (Seal)  
Attorney in Fact.

Attest: EDWIN C. PORTER,  
Agent.

The within bond is hereby approved this 17th day of December, 1915.

WM. C. VAN FLEET,  
Judge.

[Endorsed]: Filed Dec. 17, 1915. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [173]

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*In the District Court of the United States, in and  
for the Northern District of California, Second  
Division.*

No. 15,660.

TROJAN POWDER COMPANY, a Corporation,  
Plaintiff,

vs.

FIREMAN'S FUND INSURANCE COMPANY, a  
Corporation,

Defendant.

**Order Staying Execution.**

IT IS HEREBY ORDERED that execution, and all other proceedings in the above-entitled action, be and the same are hereby stayed pending the determination of the writ of error this day allowed in said cause.

Dated this 17th day of December, 1915.

WM. C. VAN FLEET,  
District Judge.

[Endorsed]: Filed Dec. 17, 1915. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [174]



*In the Southern Division of the United States District Court in and for the Northern District of California, Second Division.*

No. 15,660.

TROJAN POWDER COMPANY, a Corporation,  
Plaintiff,

vs.

FIREMAN'S FUND INSURANCE COMPANY, a  
Corporation,  
Defendant.

**Praeipie for Record on Writ of Error.**

To the Clerk of the Above-entitled Court:

Please prepare transcript of record in this cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit upon Writ of Error heretofore perfected in this court and include in said transcript the following pleadings, proceedings and papers on file herein, to wit:

1. All of the pleadings in said cause and the exhibits attached thereto.

2. All those papers required by Sections 1 and 2 of Rule 14 of the United States Circuit Court of Appeals for the Ninth Circuit.

3. All exhibits introduced by either party; said exhibits to be sent up as original exhibits.

4. This praeipie.

Dated August 9th, 1917.

McCUTCHEN, OLNEY & WILLARD,  
Attorneys for Defendant.

Service of the within praecipe for record, etc., and receipt of a copy is hereby admitted this 9th day of August, 1917.

NATHAN H. FRANK,  
IRVING H. FRANK,  
Attorneys for Plaintiff.

[Endorsed]: Filed Aug. 9, 1917. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [175]

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*In the Southern Division of the United States Dis-  
trict Court, in and for the Northern District of  
California, Second Division.*

No. 15,660.

TROJAN POWDER COMPANY, a Corporation,  
Plaintiff,

vs.

FIREMAN'S FUND INSURANCE COMPANY, a  
Corporation,

Defendant.

**Certificate of Clerk, U. S. District Court to  
Transcript of Record.**

I, Walter B. Maling, Clerk of the District Court of the United States of America, in and for the Northern District of California, do hereby certify the foregoing one hundred seventy-five (175) pages, numbered from 1 to 175, inclusive, to be a full, true and correct copy of the record and proceedings in the above-entitled cause, as the same remains of record and on file in the office of the Clerk of said court, and that the same constitute the return to the annexed writ of error.

[Seal]

By J. A. Schaertzer,

Deputy Clerk. [176]

No. 15,660.

VS.

Defendant.

## Writ of Error.

The United States of America,—ss.

The President of the United States of America, to  
the Honorable, the Judges of the District Court  
of the United States, for the Northern District  
of California, GREETING:

Because in the record and proceedings, as also in the rendition of a judgment of a plea which is in the

said District Court before you, or some of you, between Trojan Powder Company, a corporation, plaintiff, and Fireman's Fund Insurance Company, a corporation, defendant and plaintiff in error, a manifest error hath happened to the great damage of the said defendant and plaintiff in error, as by said complaint doth appear; and that, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and, in this behalf, do command you, if the judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, [177] to the United States Circuit Court of Appeals for the Ninth Circuit, together with this Writ, so that you have the same at the City and County of San Francisco, in the State of California, within thirty (30) days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States of America should be done.

WITNESS, the Honorable EDWARD D. WHITE, Chief Justice of the United States, the 17th day of December, in the year of our Lord, One Thousand Nine Hundred and Fifteen.

[Seal] WALTER B. MALING,  
Clerk of the United States District Court, for the  
Northern District of California.

By J. A. Schaertzer. [178]



Service of the within Writ of Error and receipt of a copy is hereby admitted this 17th day of December, 1915.  
NATHAN H. FRANK.

[Endorsed]: No. 15,660. In the District Court of the United States, Second Division, Northern District of California. Trojan Powder Company, a Corporation, Plaintiff, vs. Fireman's Fund Insurance Company, a Corporation, Defendant. Writ of Error. Filed Dec. 17, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

**Return to Writ of Error.**

The answer of the Judges of the District Court of the United States, in and for the Northern District of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court:

[Seal]

WALTER B. MALING,  
Clerk.

By J. A. Schaertzer,  
Deputy Clerk. [179]

*In the District Court of the United States, in and for  
the Northern District of California, Second Di-  
vision.*

No. 15,660.

TROJAN POWDER COMPANY, a Corporation,  
Plaintiff,

vs.

FIREMAN'S FUND INSURANCE COMPANY, a  
Corporation,  
Defendant.

**Citation on Writ of Error.**

United States of America,  
Northern District of California,—ss.

To the President of the United States of America,  
to the plaintiff above-named, Trojan Powder  
Company, a Corporation, and to Nathan H.  
Frank, its Attorney, GREETING:

You and each of you are hereby cited and admon-  
ished to be and appear in the United States Circuit  
Court of Appeals for the Ninth Circuit, at the City  
and County of San Francisco, State of California,  
within thirty days from and after the date this cita-  
tion bears, pursuant to a Writ of Error filed in the  
office of the Clerk of the United States Circuit Court,  
for the Northern District of California, in the above-  
entitled cause, wherein Trojan Powder Company, a  
corporation, is plaintiff, and Fireman's Fund In-  
surance Company, a corporation, is defendant, to  
show cause, if any there be, why the judgment made

and rendered in the above-entitled cause on the 21st [180] day of October, 1915, against the said Fireman's Fund Insurance Company, as defendant, in said Writ of Error mentioned, should not be corrected and reversed, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable WM. C. VAN FLEET, United States District Judge for the Northern District of California, this 17th day of December, 1915.

WM. C. VAN FLEET,  
United States District Judge for the Northern District of California.

[Seal]              Attest: WALTER B. MALING,  
Clerk of the Above-entitled Court.

By J. A. Schaertzer,  
Deputy Clerk. [181]

Service of the within Citation on Writ of Error and receipt of a copy is hereby admitted this 17th day of December, 1915.

NATHAN H. FRANK.

[Endorsed]: No. 15,660. In the District Court of the United States, Second Division, Northern District of California. Trojan Powder Company, a Corporation, Plaintiff, vs. Fireman's Fund Insurance Company, a Corporation, Defendant. Citation on Writ of Error. Filed Dec. 17, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy. Clerk.

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[Endorsed]: No. 3037. United States Circuit Court of Appeals for the Ninth Circuit. Fireman's Fund Insurance Company, a Corporation, Plaintiff

in Error, vs. Trojan Powder Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filed August 22, 1917.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.

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*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

FIREMAN'S FUND INSURANCE COMPANY, a  
Corporation,

Plaintiff in Error,

vs.

TROJAN POWDER COMPANY, a Corporation,  
Defendant in Error.

**Stipulation and Order Enlarging Time to and  
Including February 5, 1916, to Docket Cause.**

IT IS HEREBY STIPULATED AND AGREED  
by and between the respective parties hereto that  
the plaintiff in error above-named may have to and  
including the 5th day of February, 1916, within  
which to prepare and print the record and to file and  
docket this cause on writ of error in the United  
States Circuit Court of Appeals for the Ninth Circuit.



Dated January 14, 1916.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Attorneys for Plaintiff in Error.

NATHAN H. FRANK,

IRVING H. FRANK,

Attorneys for Defendant in Error.

It is so ordered.

WM. C. VAN FLEET,

District Judge.

Dated January 15th, 1916.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Fireman's Fund Insurance Company, etc., Plaintiff in Error, vs. Trojan Powder Company, etc., Defendant in Error. Stipulation and Order Enlarging Time for Docketing Cause on Writ of Error. Filed Jan. 15, 1916. F. D. Monckton, Clerk.

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*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

FIREMAN'S FUND INSURANCE COMPANY, a  
Corporation,

Plaintiff in Error,

vs.

TROJAN POWDER COMPANY, a Corporation,  
Defendant in Error.

**Stipulation and Order Enlarging Time to and  
Including February 29, 1916, to Docket Cause.**

IT IS HEREBY STIPULATED AND AGREED  
by and between the respective parties hereto that

the plaintiff in error above named may have to and including the 29th day of February, 1916, within which to prepare and print the record and to file and docket this cause on writ of error in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated February 3d, 1916.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Attorneys for Plaintiff in Error.

NATHAN H. FRANK,

IRVING H. FRANK,

Attorneys for Defendant in Error.

It is so ordered.

WM. C. VAN FLEET,

District Judge.

Dated February 3d, 1916.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. Fireman's Fund Insurance Company, a Corporation, Plaintiff in Error, vs. Trojan Powder Company, a Corporation, Defendant in Error. Stipulation and Order Enlarging Time for Docketing Cause on Writ of Error. Filed Feb. 3, 1916. F. D. Monekton, Clerk.

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*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

FIREMAN'S FUND INSURANCE COMPANY, a  
Corporation,

Plaintiff in Error,

vs.

TROJAN POWDER COMPANY, a Corporation,  
Defendant in Error.

**Stipulation and Order Enlarging Time to and  
Including March 22, 1916, to Docket Cause.**

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that the plaintiff in error above named may have to and including the 22d day of March, 1916, within which to prepare and print the record and to file and docket this cause on writ of error in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated February 28, 1916.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Attorneys for Plaintiff in Error.

NATHAN H. FRANK,

IRVING H. FRANK,

Attorneys for Defendant in Error.

It is so ordered.

WM. C. VAN FLEET,

District Judge.

Dated February 29th, 1916.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Fireman's Fund Insurance Company, a Corporation, Plaintiff in Error, vs. Trojan Powder Company, a Corporation, Defendant in Error. Stipulation and Order Enlarging Time for Docketing Cause on Writ of Error. Filed Feb. 29, 1916. F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

FIREMAN'S FUND INSURANCE COMPANY, a  
Corporation,

Plaintiff in Error,

vs.

TROJAN POWDER COMPANY, a Corporation,  
Defendant in Error.

**Stipulation and Order Enlarging Time to and  
Including April 15, 1916, to Docket Cause.**

IT IS HEREBY STIPULATED AND AGREED  
by and between the respective parties hereto that  
the plaintiff in error above named may have to and  
including the 15th day of April, 1916, within  
which to prepare and print the record and to file and  
docket this cause on writ of error in the United  
States Circuit Court of Appeals for the Ninth Circuit.

Dated March 20th, 1916.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Attorneys for Plaintiff in Error.

NATHAN H. FRANK,

IRVING H. FRANK,

Attorneys for Defendant in Error.

It is so ordered.

WM. C. VAN FLEET,

District Judge.

Dated March 20, 1916.

[Endorsed]: No. ——. In the United States Cir-  
cuit Court of Appeals for the Ninth Circuit. Fire-



man's Fund Insurance Company, a Corporation,  
Plaintiff in Error, vs. Trojan Powder Company, a  
Corporation, Defendant in Error. Stipulation and  
Order Enlarging Time for Docketing Cause on Writ  
of Error. Filed Mar. 21, 1916. F. D. Monckton,  
Clerk.

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*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

FIREMAN'S FUND INSURANCE COMPANY, a  
Corporation,

Plaintiff in Error,

vs.

TROJAN POWDER COMPANY, a Corporation,  
Defendant in Error,

**Stipulation and Order Enlarging Time to and  
Including June 15, 1916, to Docket Cause.**

IT IS HEREBY STIPULATED AND AGREED  
by and between the respective parties hereto that  
the plaintiff in error above named may have to and  
including the 15th day of June, 1916, within  
which to prepare and print the record and to file and  
docket this cause on writ of error in the United  
States Circuit Court of Appeals for the Ninth Circuit.

Dated April 13th, 1916.

IRA A. CAMPBELL,

McCUTCHEM, OLNEY & WILLARD,

Attorneys for Plaintiff in Error.

NATHAN H. FRANK,

IRVING H. FRANK,

Attorneys for Defendant in Error.

It is so ordered.

WM. W. MORROW,

United States Circuit Judge, Ninth Judicial Circuit.

Dated April 14th, 1916.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Fireman's Fund Insurance Company, a Corporation, Plaintiff in Error, vs. Trojan Powder Company, a Corporation, Defendant in Error. Stipulation and Order Enlarging Time for Docketing Cause on Writ of Error. Filed Apr. 14, 1916. F. D. Monckton, Clerk.

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*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

FIREMAN'S FUND INSURANCE COMPANY, a  
Corporation,

Plaintiff in Error,

vs.

TROJAN POWDER COMPANY, a Corporation,  
Defendant in Error.

**Stipulation and Order Enlarging Time to and  
Including July 15, 1916, to Docket Cause.**

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that the plaintiff in error above named may have to and including the 15th day of July, 1916, within which to prepare and print the record and to file and docket this cause on writ of error in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated June 14th, 1916.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Attorneys for Plaintiff in Error.

NATHAN H. FRANK,

IRVING H. FRANK,

Attorneys for Defendant in Error.

It is so ordered.

WM. H. HUNT,

Judge.

Dated June 14, 1916.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. Fireman's Fund Insurance Company, a Corporation, Plaintiff in Error, vs. Trojan Powder Company, a Corporation, Defendant in Error. Stipulation and Order Enlarging Time for Docketing Cause on Writ of Error. Filed Jun. 14, 1916. F. D. Monckton, Clerk.

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*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

FIREMAN'S FUND INSURANCE COMPANY, a  
Corporation,

Plaintiff in Error,

vs.

TROJAN POWDER COMPANY, a Corporation,  
Defendant in Error.

**Stipulation and Order Enlarging Time to and  
Including September 15, 1916, to Docket Cause.**

IT IS HEREBY STIPULATED AND AGREED  
by and between the respective parties hereto that

the plaintiff in error above-named may have to and including the 15th day of September, 1916, within which to prepare and print the record and to file and docket this cause on writ of error in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated July 10, 1916.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Attorneys for Plaintiff in Error.

NATHAN H. FRANK,

IRVING H. FRANK,

Attorneys for Defendant in Error.

It is so ordered.

WM. W. MORROW,

Judge.

Dated July 11th, 1916.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. Fireman's Fund Insurance Company, a Corporation, Plaintiff in Error, vs. Trojan Powder Company, a Corporation, Defendant in Error. Stipulation and Order Enlarging Time for Docketing Cause on Writ of Error. Filed Jul. 11, 1916. F. D. Monckton, Clerk.

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*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

FIREMAN'S FUND INSURANCE COMPANY, a  
Corporation,

Plaintiff in Error,

vs.

TROJAN POWDER COMPANY, a Corporation,  
Defendant in Error.



**Stipulation and Order Enlarging Time to and Including November 1, 1916, to Docket Cause.**

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that the plaintiff in error above named may have to and including the 1st day of November, 1916, within which to prepare and print the record and to file and docket this cause on writ of error in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated September 14th, 1916.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Attorneys for Plaintiff in Error.

NATHAN H. FRANK,

IRVING H. FRANK,

Attorneys for Defendant in Error.

It is so ordered.

WM. C. VAN FLEET,

Judge.

Dated September 11th, 1916.

[Endorsed]: No. ——. Circuit Court of Appeals. Fireman's Fund Insurance Company, a Corporation, Plaintiff in Error, vs. Trojan Powder Company, a Corporation, Defendant in Error. Stipulation and Order. Filed Sep. 12, 1916. F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

No. —.

FIREMAN'S FUND INSURANCE COMPANY, a  
Corporation,

Plaintiff in Error,

vs.

TROJAN LUMBER COMPANY, a Corporation,  
Defendant in Error.

**Stipulation and Order Enlarging Time to and  
Including January 5, 1917, to Docket Cause.**

IT IS HEREBY STIPULATED AND AGREED  
by and between the respective parties hereto that  
the plaintiff in error above named may have to and  
including the 5th day of January, 1917, within  
which to prepare and print the record and to file and  
docket this cause on writ of error in the United  
States Circuit Court of Appeals for the Ninth Circuit.

Dated October 23d, 1916.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Attorneys for Plaintiff in Error.

NATHAN H. FRANK,

IRVING H. FRANK,

Attorneys for Defendant in Error.

It is so ordered.

WM. W. MORROW,

Judge.

Dated October 24, 1916.

[Endorsed]: No. ——. In the U. S. Circuit Court of Appeals for the Ninth Circuit. Fireman's Fund Insurance Company, a Corporation, Plaintiff in Error, vs. Trojan Powder Company, a Corporation, Defendant in Error. Stipulation and Order Enlarging Time for Docketing Cause on Writ of Error. Filed Oct. 24, 1916. F. D. Monckton, Clerk.

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*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

No. ——.

FIREMAN'S FUND INSURANCE COMPANY,  
a Corporation,

Plaintiff in Error,

vs.

TROJAN POWDER COMPANY, a Corporation,  
Defendant in Error.

**Stipulation and Order Enlarging Time to and  
Including January 15, 1917, to Docket Cause.**

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that the plaintiff in error above named may have to and including the 15th day of January, 1917, within which to prepare and print the record and to file and docket this cause on writ of error in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated, January 3, 1917.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Attorneys for Plaintiff in Error.

NATHAN H. FRANK,

IRVING H. FRANK,

Attorneys for Defendant in Error.

It is so ordered.

WM. H. HUNT,

Judge.

Dated January —, 1917.

[Endorsed]: No. —. In the United States Circuit Court of Appeals for the Ninth Circuit. Fireman's Fund Insurance Company, a Corporation, Plaintiff in Error vs. Trojan Powder Company, a Corporation, Defendant in Error. Stipulation and Order Enlarging Time for Docketing Cause on Writ of Error. Filed Jan. 4, 1917. F. D. Monckton, Clerk,

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*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

No. —.

FIREMAN'S FUND INSURANCE COMPANY,  
a Corporation,

Plaintiff in Error,

vs.

TROJAN POWDER COMPANY, a Corporation,  
Defendant in Error.



**Stipulation and Order Enlarging Time to and Including January 31, 1917, to Docket Cause.**

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that the plaintiff in error above named may have to and including the 31st day of January, 1917, within which to prepare and print the record and to file and docket this cause on writ of error in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated, January 12, 1917.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Attorneys for Plaintiff in Error.

NATHAN H. FRANK,

IRVING H. FRANK,

Attorneys for Defendant in Error.

It is so ordered.

WM. W. MORROW,

Judge.

Dated January 12, 1917.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. Fireman's Fund Insurance Company, a Corporation, Plaintiff in Error, vs. Trojan Powder Company, a Corporation, Defendant in Error. Stipulation and Order Enlarging Time for Docketing Cause on Writ of Error. Filed Jan. 12, 1917. F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

No. —.

**FIREMAN'S FUND INSURANCE COMPANY,**  
a Corporation,

Plaintiff in Error,

vs.

**TROJAN POWDER COMPANY,** a Corporation,  
Defendant in Error.

**Stipulation and Order Enlarging Time to and  
Including February 13, 1917, to Docket Cause.**

IT IS HEREBY STIPULATED AND AGREED  
by and between the respective parties hereto that the  
plaintiff in error above named may have to and  
including the 13th day of February, 1917, within  
which to prepare and print the record and to file  
and docket this cause on writ of error in the United  
States Circuit Court of Appeals for the Ninth Cir-  
cuit.

Dated, January 29th, 1917.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Attorneys for Plaintiff in Error.

NATHAN H. FRANK,

IRVING H. FRANK,

Attorneys for Defendant in Error.

It is so ordered.

WM. W. MORROW,

Judge.

Dated January 29th, 1917.

[Endorsed]: No. —. United States Circuit Court of Appeals for the Ninth Circuit. Fireman's Fund Insurance Company Plaintiff in Error, vs. Trojan Powder Company, Defendant in Error. Stipulation and Order Enlarging Time for Docketing Cause on Writ of Error. Filed Jan. 29, 1917. F .D. Monckton, Clerk.

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*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

No. —.

FIREMAN'S FUND INSURANCE COMPANY,  
a Corporation,

Plaintiff in Error,

vs.

TROJAN POWDER COMPANY, a Corporation,  
Defendant in Error.

**Stipulation and Order Enlarging Time to and  
Including February 27, 1917, to Docket Cause.**

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that the plaintiff in error above named may have to and including the 27th day of February, 1917, within which to prepare and print the record and to file and docket this cause on writ of error in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated February 12, 1917.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Attorneys for Plaintiff in Error.

NATHAN H. FRANK,

IRVING H. FRANK,

Attorneys for Defendant in Error.

It is so ordered.

WM. W. MORROW,

Judge.

Dated February 13, 1917.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. Fireman's Fund Insurance Company, a Corporation, Plaintiff in Error, vs. Trojan Powder Company, a Corporation, Defendant in Error. Stipulation and Order Enlarging Time for Docketing Cause on Writ of Error. Filed Feb. 13, 1917. F. D. Monckton, Clerk.

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*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

No. ——.

FIREMAN'S FUND INSURANCE COMPANY,  
a Corporation,

Plaintiff in Error,

vs.

TROJAN POWDER COMPANY, a Corporation,  
Defendant in Error.



**Stipulation and Order Enlarging Time to and Including March 10, 1917, to Docket Cause.**

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that the plaintiff in error above named may have to and including the 10th day of March, 1917, within which to prepare and print the record and to file and docket this cause on writ of error in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated, February 26th, 1917.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Attorneys for Plaintiff in Error.

NATHAN H. FRANK,

IRVING H. FRANK,

Attorneys for Defendant in Error.

It is so ordered.

WM. W. MORROW,

Judge.

Dated February 26th, 1917.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. Fireman's Fund Insurance Company, a Corporation, Plaintiff in Error, vs. Trojan Powder Company, a Corporation, Defendant in Error. Stipulation and Order Enlarging Time for Docketing Cause on Writ of Error. Filed Feb. 26, 1917. F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

No. —.

**FIREMAN'S FUND INSURANCE COMPANY,**  
a Corporation,

Plaintiff in Error,

vs.

**TROJAN POWDER COMPANY,** a Corporation,  
Defendant in Error.

**Stipulation and Order Enlarging Time to and  
Including April 5, 1917, to Docket Cause.**

IT IS HEREBY STIPULATED AND AGREED  
by and between the respective parties hereto that the  
plaintiff in error above named may have to and  
including the 5th day of April, 1917, within  
which to prepare and print the record and to file  
and docket this cause on writ of error in the United  
States Circuit Court of Appeals for the Ninth Cir-  
cuit.

Dated March 8, 1917.

**IRA A. CAMPBELL,**

**McCUTCHEN, OLNEY & WILLARD,**

Attorneys for Plaintiff in Error.

**NATHAN H. FRANK,**

**IRVING H. FRANK,**

Attorneys for Defendant in Error.

It is so ordered.

**WM. W. MORROW,**

Judge.

Dated March 9, 1917.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. Fireman's Fund Insurance Company, a Corporation, Plaintiff in Error, vs. Trojan Powder Company, a Corporation, Defendant in Error. Stipulation and Order Enlarging Time for Docketing Cause on Writ of Error. Filed Mar. 9, 1917. F. D. Monckton, Clerk.

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*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

No. ——.

FIREMAN'S FUND INSURANCE COMPANY,  
a Corporation,

Plaintiff in Error,

vs.

TROJAN POWDER COMPANY, a Corporation,  
Defendant in Error.

**Stipulation and Order Enlarging Time to and  
Including April 20, 1917, to Docket Cause.**

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that the plaintiff in error above named may have to and including the 20th day of April, 1917, within which to prepare and print the record and to file and docket this cause on writ of error in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated April 4th, 1917.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Attorneys for Plaintiff in Error.

NATHAN H. FRANK,

IRVING H. FRANK,

Attorneys for Defendant in Error.

It is so ordered.

WM. W. MORROW,

Judge.

Dated April 4, 1917.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Fireman's Fund Insurance Company, a Corporation, Plaintiff in Error, vs. Trojan Powder Company, a Corporation, Defendant in Error. Stipulation and Order Enlarging Time for Docketing Cause on Writ of Error. Filed Apr. 4, 1917. F. D. Monckton, Clerk.

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*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

No. ——.

FIREMAN'S FUND INSURANCE COMPANY,  
a Corporation,

Plaintiff in Error,

vs.

TROJAN POWDER COMPANY, a Corporation,  
Defendant in Error.

**Stipulation and Order Enlarging Time to and  
Including May 8, 1917, to Docket Cause.**

IT IS HEREBY STIPULATED AND AGREED  
by and between the respective parties hereto that the



plaintiff in error above named may have to and including the eighth day of May, 1917; within which to prepare and print the record and to file and docket this cause on writ of error in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated April 18, 1917.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Attorneys for Plaintiff in Error.

NATHAN H. FRANK,

IRVING H. FRANK,

Attorneys for Defendant in Error.

It is so ordered.

WM. W. MORROW,

Judge.

Dated, April 19, 1917.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Fireman's Fund Insurance Company, a Corporation, Plaintiff in Error, vs. Trojan Powder Company, a Corporation, Defendant in Error. Stipulation and Order Enlarging Time for Docketing Cause on Writ of Error. Filed Apr. 19, 1917. F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

No. —.

FIREMAN'S FUND INSURANCE COMPANY,  
a Corporation,

Plaintiff in Error,

vs.

TROJAN POWDER COMPANY, a Corporation,  
Defendant in Error.

**Stipulation and Order Enlarging Time to and  
Including June 8, 1917, to Docket Cause.**

IT IS HEREBY STIPULATED AND AGREED  
by and between the respective parties hereto that the  
plaintiff in error above named may have to and  
including the eighth day of June, 1917, within which  
to prepare and print the record and to file and docket  
this cause on writ of error in the United States Cir-  
cuit Court of Appeals for the Ninth Circuit.

Dated, May 8th, 1917.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Attorneys for Plaintiff in Error.

NATHAN H. FRANK,

IRVING H. FRANK (N. H. Jr.)

Attorneys for Defendant in Error.

It is so ordered.

WM. W. MORROW,

Judge.

Dated May 8, 1917.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. Fireman's Fund Insurance Company, a Corporation, Plaintiff in Error, vs. Trojan Powder Company, a Corporation, Defendant in Error. Stipulation and Order Enlarging Time for Docketing Cause on Writ of Error. Filed May 8, 1917. F. D. Monckton, Clerk.

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*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

FIREMAN'S FUND INSURANCE COMPANY,  
a Corporation,

Defendant in Error.

vs.

TROJAN POWDER COMPANY, a Corporation,  
Defendant in Error.

**Order Enlarging Time to and Including June 20,  
1917, to Docket Cause.**

IT IS HEREBY ORDERED that the plaintiff in error above named may have to and including the 20th day of June, 1917, within which to prepare and print the record and to file and docket this cause on writ of error in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated June 8th, 1917.

WM. W. MORROW,  
Judge.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. Fireman's Fund Insurance, Plaintiff in Error, vs. Trojan Powder Company, Defendant in Error. Order

Enlarging Time for Docketing Cause on Writ of Error. Filed June 8, 1917. F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

No. —.

FIREMAN'S FUND INSURANCE COMPANY,  
a Corporation,

Plaintiff in Error.

vs.

TROJAN POWDER COMPANY a Corporation,  
Defendant in Error.

**Stipulation and Order Enlarging Time to and  
Including July 10, 1917, to Docket Cause.**

IT IS HEREBY STIPULATED AND AGREED  
by and between the respective parties hereto that the  
plaintiff in error above named may have to and  
N. H. F. including the 10th day of July, 1917, with-  
in which to prepare and print the record and to file  
and docket this cause on writ of error in the United  
States Circuit Court of Appeals for the Ninth Cir-  
cuit.

Dated June —, 1917.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Attorneys for Plaintiff in Error.

NATHAN H. FRANK,

IRVING H. FRANK,

Attorneys for Defendant in Error.



It is so ordered.

WM. H. HUNT,  
Judge.

Dated June 18, 1917.

[Endorsed]: No. —. United States Circuit Court of Appeals for the Ninth Circuit. Fireman's Fund Insurance Company, a Corporation, Plaintiff in Error, vs. Trojan Powder Company, a Corporation, Defendant in Error. Stipulation and Order Enlarging Time for Docketing Cause on Writ of Error. Filed Jun. 18, 1917. F. D. Monckton, Clerk.

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*In the United States Circuit Court of Appeals for the  
Ninth Circuit.*

No. —.

FIREMAN'S FUND INSURANCE COMPANY,  
a Corporation,

Plaintiff in Error,

vs.

TROJAN POWDER COMPANY, a Corporation,  
Defendant in Error.

**Stipulation and Order Enlarging Time to and  
Including August 10, 1917, to Docket Cause.**

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that the plaintiff in error above named may have to and including the 10th day of August, 1917, within which to prepare and print the record and to file and docket this cause on writ of error in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated July 7th, 1917.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Attorneys for Plaintiff in Error.

NATHAN H. FRANK,

IRVING H. FRANK,

Attorneys for Defendant in Error.

It is so ordered.

WM. M. MORROW,

Judge.

Dated July 9th, 1917.

[Endorsed]: No. ——. In the U. S. Circuit Court of Appeals for the Ninth Circuit. Fireman's Fund Insurance Company, a Corporation, Plaintiff in Error, vs. Trojan Powder Company, a Corporation, Defendant in Error. Stipulation and Order Enlarging Time for Docketing Cause on Writ of Error. Filed Jul. 9, 1917. F. D. Monckton, Clerk.

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*In the United States Circuit Court of Appeals for the Ninth Circuit.*

No. ——.

FIREMAN'S FUND INSURANCE COMPANY, a Corporation,

Plaintiff in Error,

vs.

TROJAN POWDER COMPANY, a Corporation,  
Defendant in Error.

**Stipulation and Order Enlarging Time to and Including August 31, 1917, to Docket Cause.**

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that the

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plaintiff in error above named may have to and including the 31st day of August, 1917, within which to prepare and print the record and to file and docket this cause on writ of error in the United States Circuit Court of Appeals for the Ninth Circuit. This stipulation is signed on condition the above cause is placed on the October, 1917, calendar.

Dated August 9, 1917.

IRA A. CAMPBELL,

McCUTCHEM, OLNEY & WILLARD,

Attorneys for Plaintiff in Error.

NATHAN H. FRANK,

IRVING H. FRANK,

Attorneys for Defendant in Error.

It is so ordered.

WM. W. MORROW,

Judge.

of this Insurance or any part thereof without prejudice to this Insurance the charges hereby insured AND (it is expressly declared and agreed that the acts of Insurer or insured shall not be considered a waiver or acceptance of abandonment) AND it is declared Hides Skins and *Molasses* shall be and are warranted

to be k or burnt or unless caused by collision with any other Ship or Vessel and that Sugar in average under Five Pounds per centum and that all other Goods and also Ship and

Three Pounds per centum unless general or the Ship be stranded sunk or burnt.

for loss or damage to the interest insured under this policy same shall be reported as i. No. 1 Cornhill E. C. London or Messrs. Brodriek Leitch & Kendall No. B 18 Liver-

pooler shall be paid at the office of this Company in San Francisco or at the office

of loss signed by Joseph Hadley Esq. or Messrs. Brodriek Leitch & Kendall.

THE COMPANY has caused these presents to be signed by its duly authorized officers

\_\_\_\_\_ day of \_\_\_\_\_ one thousand nine hundred and \_\_\_\_\_  
Marine Agent.

WM. J. DUTTON,  
President.

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ORIGINAL

CARGO—ENGLISH FORM

**FIREMAN'S FUND INSURANCE COMPANY**

**SAN FRANCISCO, CALIFORNIA**

All Policies issued abroad and made payable in the United Kingdom are required by law to have a Government Stamp of one penny per £100 affixed within ten days after date of receipt in the United Kingdom.

No. 307264

£ \$35,000

Warranted free of capture, seizure and detention and the consequences thereof or of any attempt therat piracy excepted and also from all consequences of riots, civil commotions, hostilities or warlike operations, whether before or after declaration of war.

It is hereby agreed that the rights of the assured shall not be prejudiced by the insertion in the bill of lading of the London conference rules of affreightment 1893, or of the following clause:

"The act of God, perils of the sea, fire, barratry of the master and crew, enemies, pirates, thieves, arrest, and restraint of princes, rulers and people, collisions, stranding and other accidents of navigation excepted, even when occasioned by the negligence, default, or error in judgment of the pilot, master mariners, or other servants of the ship-owners."

Warranted free from average unless general or the ship or craft be stranded, sunk or burnt, each craft or lighter being deemed a separate insurance.

Underwriters notwithstanding this warranty to pay for any damage caused by fire or by collision with any other ship or vessel or with ice or with any substance other than water and any special charges for warehouse rent, re-shipping or forwarding for which they would otherwise be liable, also to pay the insured value of any package or packages which may be totally lost in trans-shipment.

WHEREAS it hath been proposed to the FIREMAN'S FUND INSURANCE COMPANY by Trojan Powder Co.

as well in his or their own name as for and in the name and names of all and every other person or persons, to whom the subject matter of this policy does may or shall appertain in part or in all to make with the said Company the Insurance hereinafter mentioned and described.

Now this Policy Witnesseth that in consideration of the said person or persons effecting this Policy promising to pay to the said Company the sum of One Hundred & Seventy-Five and 00/00ths.....DOLLARS as a premium at and after the rate of ½% per cent for such Insurance the said Company takes upon itself the burthen of such Insurance to the amount of Thirty-Five Thousand and 00/100.....DOLLARS

and promises and agrees with the insured their Executors, Administrators and Assigns in all respects truly to perform and fulfill the Contract contained in this Policy. AND it is hereby agreed and declared that the said Insurance shall be and is an Insurance (lost or not lost) at and from San Francisco Bay to Balboa.

AND it is also agreed and declared that the subject matter of this Policy as between the Assured and the said Company so far as concerns this Policy shall be and is as follows upon \$35,000—on 6000 cases High explosives.

the Ship or vessel called the Str. "Pleiades"

laden (under deck) on board

General average payable as per Foreign Statement or per York-Antwerp Rules of 1890 if in accordance with the Contract of Affreightment Warranted that should the vessel ground within the limits of the Columbia and/or Willamette and/or Fraser Rivers and/or Suen Canal and/or Manchester Ship Canal or its connections and/or in the River Mersey above Rock Ferry Ship, such grounding not to be deemed a stranding, but Underwriters to pay for any damage which may be proved to have directly resulted therefrom.

In the event of the vessel making any deviation or change of voyage, it is mutually agreed that such deviation or change shall be held covered at a premium to be arranged, provided due notice be given by the assured on receipt of advice of such deviation or change of voyage. Including risk of craft and boats to and from the ship or vessel each craft or boat to be deemed a separate risk.

All questions of liability arising under this policy are to be governed by the laws and customs of England. This Policy is issued in duplicate. Freight warranted free from any claim consequent upon loss of time whether arising from a peril of the sea or otherwise.

The preceding clauses and all clauses annexed hereto or stamped hereon shall control other printed conditions inconsistent with the same.

AND the said Company promises and agrees that the Insurance aforesaid shall commence upon the said Freight Goods and Merchandise from the time when the Goods and Merchandise shall be laden on board the said Ship or Vessel Craft or Boat as above and continue until the said Goods and Merchandise be discharged and safely landed at as above AND that it shall be lawful for the said Ship or Vessel in the Voyage so insured as aforesaid to proceed and sail to and touch and stay at any Ports or Places whatsoever without prejudice to this Insurance AND touching the Adventures and Perils which the said Company is content to bear and does take upon itself in the Voyage so insured as aforesaid they are of the Seas Men-of-War Fire Enemies Pirates Rovers Thieves Jettisons Letters of Mart and Counter Mart Surprisals Takings at Sea Arrests Restraints and Detainments of all Kings Princes and People of what Nation Condition or Quality soever Barratry of the Master and Mariners and of all other Perils Losses and Misfortunes that have or shall come to the Hurt Detriment or Damage of the aforesaid subject matter of this Insurance or any part thereof AND in case of any Loss or Misfortune it shall be lawful to the Insured their Factors Servants and Assigns to sue labour and travel for in and about the Defence Safeguard and Recovery of the aforesaid subject matter of this Insurance or any part thereof without prejudice to this Insurance the charges whereof the said Company will bear in proportion to the sum hereby insured AND (it is expressly declared and agreed that the acts of Insurer or Insured in Recovering Saving or Preserving the Property Insured shall not be considered a waiver or acceptance of abandonment) AND it is declared and agreed that Corn Fish Salt Saltpetre Fruit Flour Rice Seeds Hides Skins and Molasses shall be and are warranted free from average unless general or the Ship be stranded sunk or burnt or unless caused by collision with any other Ship or Vessel and that Sugar Tobacco Hemp and Flax shall be and are warranted free from average under Five Pounds per centum and that all other Goods and also Ship and Freight shall be and are warranted free from average under Three Pounds per centum unless general or the Ship be stranded sunk or burnt.

It is hereby understood and agreed that in case of claim for loss or damage to the interest insured under this policy same shall be reported as soon as goods are landed or loss known to Joseph Hadley Esq. No. 1 Cornhill E. C. London or Messrs. Brodick Leitch & Kendall No. B 18 Liverpool and London Chambers Liverpool; and that all claims hereunder shall be paid at the office of this Company in San Francisco or at the office of Messrs. Brown, Shipley & Company London upon certificate of loss signed by Joseph Hadley Esq. or Messrs. Brodick Leitch & Kendall.

In Witness Whereof the FIREMAN'S FUND INSURANCE COMPANY has caused these presents to be signed by its duly authorized officers

in the CITY OF SAN FRANCISCO, STATE OF CALIFORNIA, this \_\_\_\_\_ day of \_\_\_\_\_ one thousand nine hundred and \_\_\_\_\_ Not valid unless countersigned by GEORGE E. BILLINGS, Marine Agent.

A. M. FOLLANSBEE, Jr.,  
Marine Secretary.

WM. J. DUTTON,  
President

ORIGINAL  
ENGLISH CARGO

FIREMAN'S FUND  
INSURANCE COMPANY

—OF—

SAN FRANCISCO, CALIFORNIA

---

No. 307264

Date August 7, 1912.

---

Vessel

"Pleiades"

Trojan Powder Co.

---

£ \$35,000	at $\frac{1}{2}$	%
	£ \$175.00	

---

Geo. E. Billings  
J. C. Meussdorffer

Roy C. Ward

Jas. K. Polk  
Jas. W. Dean

GEO. E. BILLINGS CO.  
INSURANCE BROKERS and  
AVERAGE ADJUSTERS

---

312 CALIFORNIA STREET

Phones DOUGLAS 2283  
HOME C 2899

SAN FRANCISCO, CAL.

[Pasted across face of policy]:

PLEASE READ YOUR POLICY

This Policy is written in exact accordance with our information. If there are any points or alterations of which we have not been advised, your policy may be incorrect. If in doubt, phone, write or call upon

GEO. E. BILLINGS CO.



[Endorsed]: No. 15,660. U. S. Dist. Court, Nor. Dist. of Cal. Pltffs. Exhibit 1. 5/22/14. W. B. M., Clerk.

No. 3037. U. S. Circuit Court of Appeals for the Ninth Circuit. Plaintiff's Exhibit No. 1. Filed Aug. 24, 1917. F. D. Monckton, Clerk.



**Plaintiff's Exhibit No. 2—Bill of Lading Issued by California-Atlantic Steamship Company to Trojan Powder Co. (Original).**

(4-8-12—10M)

**CALIFORNIA-ATLANTIC  
STEAMSHIP CO.**

[House Flag] **BATES & CHESEBROUGH, General Agents**

**and**

**PANAMA RAILROAD CO.**

In Connection with other Carriers on the Route

Marks and Numbers.

I. C. C.  
Port of Ancon  
W. O. 32980  
Z. R. 1857-C

Freight from San Fran. to Balboa

via.....Line.

.....feet @.....per 40 Cubic feet .....

.....lbs. @....." 2240 lbs. English .....

360000 ..... 4050.00

360000 lbs. @ 22.50...." 2000 lbs. English.....\$3275.36

.....lbs. English @.....per 100 lbs.  
(101 1-10 lbs. English—100 lbs. Spanish.)

Value.....@ % .....

Charges Advanced.....

Landing charges..... 900.00

150 tons at \$5 per ton..... 750.00

180

Total ..... 4950.00

**Notes.** Rates, weight and/or measurement subject to correction. One pound sterling to be considered equal to \$4.80 United States gold currency; except that when freight is prepaid, \$4.86 United States gold is equivalent to £1 sterling. When freight to the following countries is expressed in sterling, the rate per £ to be: Germany, Marks, 20.50; France, France, 25.25; Italy, Lire, 25.25; Spain, in Spanish money at current rate of exchange.

Minimum Bill of Lading, £1.11.6.

Received payment S. W. Good,

For the Company.

State Toll.....

(The Signature of the Agent here acknowledges only the amount Prepaid.)

[Stamped across face]: Freight Prepaid.

[Stamped in margin]: Prepaid.

**Received by the CALIFORNIA-ATLANTIC STEAMSHIP CO.**

Voy. 10 B./L. 1

At the port of San Francisco.....

From Trojan Powder Company.....

under the contract hereinafter contained the property mentioned below, marked and numbered as follows or as per margin (but countermarks always excepted), in apparent good order and condition (weight, contents and value unknown), viz:—

.....  
six thousand (6000) Trojan Powder  
.....

Consigned to Isthmian Canal Commission.....at Balboa .....

to be transported by steamship "Pleiades".....appointed to sail Aug. 10th.....  
or by any other or succeeding steamer or vessel, whether belonging to said corporation or to any other owner, to the port of Ancon, and there, if that be their port of assignment, to be delivered to consignee or his assigns, if called for by him or them, as in this contract provided, he or they paying freight and charges thereon (unless prepaid), and average, if any; or if consigned beyond, to be there delivered to connecting carrier and so on by one connecting carrier to another until they reach the port or place of assignment. The said California-Atlantic Steamship Co. is hereby expressly granted the right and option of delivering the merchandise represented by this Bill of Lading to consignees from alongside, or of landing and storing said merchandise either in lighters, hulks or wharf, or in warehouse immediately upon the arrival of said Steamer at the port of discharge of said merchandise, without notice to and at the expense of consignee; and in the event of its so landing and storing said merchandise, said Company is thereupon hereby released from all further liability for loss or damage thereafter, whether arising from fire or from any other cause.

Each carrier shall be bound (subject to the limitations and exceptions contained in this contract, whether printed or written on the face or back hereof) to deliver said goods in the same order and condition as that in which it received them; and the ultimate carrier to deliver them at its station, anchorage or wharf, in the customary manner to the consignee or his assigns, if called for by him or them, as in this contract provided, he or they paying freight and charges thereon before delivery if required (unless prepaid), and average, if any, according to York-Antwerp Rules, or at carrier's option, as to matters not therein provided for, according to usages of the vessel's home port. General average when happening to a steamer of the California-Atlantic Steamship Co. to be adjusted according to the laws of the United States. If the owner shall have exercised due diligence to make the steamer in all respects seaworthy, and to have her properly manned, equipped and supplied, it is hereby agreed that, in case of danger, damage or disaster resulting from faults or errors in navigation, or in the management of the steamer, or from any latent defect in the steamer, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent defect or the unseaworthiness was not discovered by the exercise of due diligence), the consignees or owners of the cargo shall nevertheless pay salvage, and any special charges incurred in respect of the cargo, and shall contribute with the shipowner in General Average to the payment of any sacrifices, losses or expenses of a General Average nature that may be made or incurred for the common benefit, or to relieve the adventure from any common peril, all with the same force and effect, and to the same extent, as if such danger, damage or disaster had not resulted from or been occasioned by faults or errors in navigation or in the management of the vessel, or any latent defect or unseaworthiness. Any mails carried to be exempted from contribution to General Average.

Clean coffee must be designated as such in the bill of lading, or the freight for shell coffee will be charged.

It is agreed that said freight, whether prepaid or to be collected, is to be considered as earned, vessel or goods lost or not lost at any stage of the entire transit, and on the happening of any of the herein excepted contingencies the carriers are to have the right to forward the above-mentioned packages to the ports of destination on their own routes, and shall receive extra compensation for such service, whether performed by their own vessels or those of strangers; and in case of salvage services rendered to aforesaid merchandise or treasure, during the voyage, by vessel or vessels of the carriers, such salvage service shall be paid for as fully as if such salvaging vessel or vessels belonged to strangers.

Every carrier is liable to the preceding carrier for all accrued charges; and, in the event of loss of the property after transfer from one carrier to another, the carrier having the property in charge when the loss occurs shall have a lien on the remaining property, if any, for all such advances.

It is mutually agreed that the liability of each carrier, as to goods destined beyond its own route, shall be terminated by proper delivery of them to the next succeeding carrier. This bill of lading is signed for the different carriers who may be engaged in the transportation, severally, not jointly, and each of them is to be bound by and have the benefit of all the conditions thereof as if signed by it, the shipper, owner and consignee. The acceptance of this bill of lading is an agreement on the part of the shipper, owner and consignee of the goods to be bound by all of its stipulations, exceptions and conditions as fully as if they were all signed by such shipper, owner, and consignee. This bill of lading shall have the effect of a special contract not liable to be modified by a receipt from or any act of an intermediate carrier, but as to steamers employed by the California-Atlantic Steamship Co. and the Panama Railroad Company, subject to all the terms and provisions of, and all the exemptions from liability contained in, the Act of Congress of the United States approved on the 13th day of February, 1893.

And it is further agreed that after customary notice to the consignee or owner of the arrival of the property described herein at the destination or point of delivery named in this bill of lading, and a reasonable period allowed thereafter for its removal from warehouses or cars, storage charges as usually applicable at such point of delivery may be made and collected on the property remaining undelivered; and such demurrage charges made and collected on loaded cars as the delivering road may have established.

IN WITNESS WHEREOF, 2 bills of lading, all of this tenor or date, have been signed, one whereof being accomplished, the others to stand void.

Dated at San Francisco, this 10th day of August, 1912.

Shippers are requested to read this contract, including conditions on back.

Accepted.....Shippers.

S. W. GOOD,  
For California-Atlantic Steamship Co. and Connecting Carriers.

Extract from the Laws of the United States, Relating to Steamboats.—"Section 8. And he it further enacted that hereafter all Gunpowder, Oil of Turpentine, and other inflammable materials, and all other goods, wares, or merchandise, of whatever kind, shall be packed, stored, or put up for shipment on board any such vessel (steamer carrying passengers) shall be securely packed, or put up separately from each other, and from all other inflammable materials, and from all other goods, wares, or merchandise, of whatever kind, and shall be distinctly marked on the outside with the name and description of the articles contained therein; and every person who shall pack or put up, or cause to be packed or put up, for shipment on board of any such vessel, any Gunpowder, Oil of Turpentine, Oil of Vitriol, Camphene, or any other inflammable materials, or any other goods, wares, or merchandise, of whatever kind, shall be deemed guilty of misdemeanor, and punished by a fine not exceeding one thousand dollars, or imprisonment not exceeding eighteen months, or both."—See back of Bill of Lading, Condition 5.

## CONDITIONS OF THIS BILL OF LADING.

1. The carriers shall have liberty to transfer the goods to and transport them by lighters, barges, or any other vessel than that named, to lighter from steamer to steamer and from steamer to shore, or from shore to steamer, and shall have liberty to sail without pilots, to low and assist vessels in any situation, and to go to or stop at any port or ports en route or beyond, and to deviate, with like privilege to stop. It is agreed that the goods may be lightered, ferried or carted to the consignee or a connecting carrier in Bay of Panama or elsewhere at the owner's risk. The Panama Railroad Company will not be responsible for loss or damage to goods or treasure from fire in cars, in warehouse, on wharf, or in lighters in the Bay of Panama.

2. No carrier shall be liable for delay, nor in any other respect than as warehouseman, while the said property awaits conveyance from any point of transshipment, and in case the whole or any part of the property specified herein be prevented by any cause from going from port in the first steamer of the line stated, leaving after the arrival of such property at the port, the carrier hereunder then in possession is at liberty to forward said property by succeeding steamer of said line, or, if deemed necessary by any other steamer or route.

3. No carrier, or the property of any, shall be liable for gold, silver, precious stones or metals, jewelry, or treasure of any kind, bank notes, securities, silks, furs, floss, pictures, plate, china, glass or statuary, unless bills of lading are signed therefor, in which their nature and value are expressed and extra freight expressed and paid for the assumption of extraordinary risk nor for any loss or damage arising from any of the following causes, viz.: fire from any cause, on land or on water, jettison, ice, freshets, floods, weather, pirates, robbers, or thieves, acts of God or of the country's enemies; riots, strikes, or stoppage of labor; collisions, explosions, accidents to boilers or machinery, or any latent defect in hull, machinery or appurtenances; or unseaworthiness of the ship, even existing at time of shipment or sailing; or failure to provide the owners or default whatsoever of the pilots, masters, mariners or other servants or agents of the steamer; or for loss or damage of any kind on goods packed in bales or whose bulk or nature requires to be carried on deck or on open cars, or for the condition of packages or deficiency in bill of lading, or for extra freight, paid thereon, as per tariff; or for any injury that may happen under any circumstances to the goods, or the death of any living creature that may be embarked, or sent for embarkation, on board the carriers.

4. All liabilities under this Bill of Lading shall be determined on the basis of the actual market value of the goods at the time of ship's entry at port of destination, but the Carriers shall not be liable for any value exceeding one hundred dollars (\$100.00) U. S. Gold upon each package, unless the value exceeds that amount, as expressed in the Bill of Lading, and extra freight, paid thereon, as per tariff; and shipper covenants that such claims shall in no case exceed \$100 for loss or damage to or for conversion of any one of said packages unless a greater package valuation be written hereon.

5. Explosives, inflammable, or other dangerous articles may be transported, if the carrier chooses, on deck or elsewhere, and they shall, in all cases, be at the owner's risk. If any such articles be secretly delivered to the carrier, the shipper shall be responsible for any damage resulting therefrom, and such articles may be destroyed by the carrier without incurring any liability therefor.

6. All articles named in this bill of lading are subject to charges for necessary cooerage and repairs. No liability shall exist for wrong carriage or delivery of goods marked with initials or imperfectly marked, unless name and address of consignee be given in writing at time of shipment, such marking being agreed to be taken as proof of contributory negligence. Should it be found on the cargo being discharged that goods have been landed without marks or with marks differing from those on the bill of lading, or with marks and numbers not distinguishable, the same shall be apportioned to the different lots, and consignees shall conform to such allotment. All claims for damage to goods must be made at the time of, and extent thereof fully disclosed, in the presence of the agent of the company having the same then in custody, before they are removed from the station or wharf. Unless written demand for damage shall be made at the time of receipt thereof, or upon the carrier which actually delivered the goods, within ten days after delivery, all claims for damage shall be taken to have been waived, and no suit shall thereafter be maintainable to recover the same. No agent or employee shall have authority to waive such demand.

7. Also that if the ship is prevented by Quarantine from reaching her destination, or making due delivery of the goods, or is detained at quarantine, the goods may be forwarded by any previous notice to shipper, owner or consignee, discharged into depot, lazaretto, or wharf, at the expense of the shipper, owner or consignee, all and any of them, and such discharge shall be deemed a full and final delivery of the goods, all risk, responsibility and expenses of the carrier shall cease and the goods, if otherwise, ending as soon as the goods are delivered from the ship's tackle, and the expenses of the actual discharge, and all increased cost of such delivery shall be paid by shipper, owner and consignee, all and any of them, the carrier retaining a lien on the goods therefor, but should the ship or goods not be admitted, or such discharge be impracticable, or so in the master's opinion, the carrier may forward the goods by any other notice proceed to the nearest safe port, or at ship's option to the nearest safe port to which the ship is bound, at the risk and expense of shipper, owner and consignee, all and any of them, and the goods as if at the original port of shipment, and all the risk and expense of shipper, owner and consignee, all and any of them, he and they paying freight from the original port of discharge, and the carrier retaining a lien on the goods therefor and for all costs, charges and expenses incurred, and forwarded, and all risks, and expenses incurred thereafter shall be on account of shipper, owner and consignee, all and any of them, and they having a lien upon the goods specified in this bill of lading for all arrangements of freight and charges due by the same owners or consignees on other goods. In case of loss or damage to the goods, the carrier may forward the goods, and they were at the time of such loss, damage, detriment or delay, shall alone be responsible therefor. The receipt of any carrier for the goods shall be prima-facie evidence of the condition of the goods at the time of receipt, against any other carrier. None of the carriers under this bill of lading will be responsible for deterioration or damage to cargo caused by fumigation or disinfection ordered by the sanitary authorities.

8. When the loading, transport, transshipment or delivery is prevented in consequence of ice, weather, epidemic, quarantine, sanitary measures, blockade, war, rebellion, strikes, troubles, labor agitations, and all analogous circumstances whatsoever, the Captain or Company or the Agents shall be entitled to load, discharge, transship, put into warehouse, into quarantine depot, or into a lighter, bulk or car, and to deliver all or any part of the goods, whether the terminus of the voyage or not, and all risks whatsoever, and all expenses of transshipment or warehousing of Customs, of Customs, of Surtax de l'Entree Pot, and all extra expenses of whatsoever kind incurred in consequence of the above circumstances will be entirely for

account of the shipper, consignee or party claiming the goods: even though some part of such extra expenses may be occasioned by the fault of the Captain or shipowner; the Master and Owner being discharged from all responsibility on the goods being placed in charge of the Custom House or any Mercantile Agent or Consul.

9. The goods shall be received by the owner or consignee at the station or wharf of the carrier at the ultimate point of delivery, in lots or parts of lots, and if not taken away within twenty-four hours after arrival may, at the option of the delivering carrier, be sent to a warehouse, or be permitted to lie where landed, all at the expense and risk of the shipper, owner or consignee. If no address of a person at the ultimate point of delivery, immediately entitled to such delivery be disclosed by this bill of lading, the same must be furnished by the shipper, owner or consignee, in writing, to the terminal carrier, before the time at which in ordinary course of transportation the goods should arrive at such point. A failure to do this or remove the goods within twenty-four hours after their arrival shall, in case of any subsequent loss or injury to the latter, be treated as conclusive proof of negligence on the part of the shipper, owner or consignee, which contributed to such loss or injury. Negligence shall not be presumed as against any carrier under this bill of lading, and no liability shall exist therefor without actual and affirmative proof thereof.

10. If destination is a seaport, the ship may commence discharging immediately on arrival and discharge continuously, the Collector of the Port being hereby authorized to grant a general order for discharge immediately on arrival. Goods to be delivered at ship's tackle, and all charges from thence, including cargo expenses, weighing, and delivering to be borne by consignee. If the goods be not taken away by the consignee at the time as is provided by the regulations of the port of discharge, they may by the carrier be sent to store, permitted to lie where landed, or returned to the port of shipment, at the expense and risk of the owner, shipper or consignee.

11. If cargo for Callao to be delivered to the Custom House or Muella Darsena, on receipt, which receipt will relieve the carrier from all responsibility, shillings per ton extra will be charged on all goods landed by the Muella Darsena to, at Callao, but the Steamship Company's responsibility shall cease immediately the goods have been landed at the Custom House or Muella Darsena, and in the ports of Central America and Mexico, the cargo will be discharged by the agent of the carrier, for account and risk of owners of the goods, the landing charges being for their account, and the articles named, in this bill of lading shall be taken away by the consignee, there immediately after the arrival of the steamer at the port of destination, or the same may be stored at the warehouse of the owner, shipper or consignee thereof, or carried forward to steamer's destination and landed on her return for account and at the risk and expense of whom it may be.

12. In case of surf or state of the weather or other conditions upon the arrival of the steamer, the Master may be such as to render it, in the judgment of the Captain, impracticable to land goods at the ports to which they are destined, or if, from delay or neglect of the consignee, or other causes, the goods or any part thereof, be not transhipped, taken from alongside or landed at any port, the same may be discharged into quarantine depot, or into a lighter, bulk or craft, or be taken to convenient port, and be transhipped, or landed and stored and reshipped, or retained on board, and be forwarded or delivered on a subsequent opportunity, in either case at the risk and expense of the consignee and/or owner of the goods. It is also expressly stipulated and agreed that all charges for steamer freight shall not be landed without the proper permission of the Custom House authorities of the port of destination, and if the consignees fail to obtain this, the cargo shall be conveyed back to Ancón for their account and risk at regular through rates. It is understood and agreed that all charges demanded by the steamer for landing this cargo shall be paid by the consignees of same. The carriers are not responsible in respect of goods for France for any Surtax de l'Entree Pot. In case of the goods being consigned with option of delivery at another port than the port of consignment named hereon, the goods shall be delivered to be declared at the first of said ports called at by the steamer, within one hour from the time of the steamer's arrival at that port. Failing such declaration, the carrier reserves to themselves the right to discharge the goods at the port of consignment, such goods thereafter to be at the risk and expense of the consignees or owners of the goods.

13. In case of the blockade or interdict of the port of delivery or transshipment, or if, without such blockade or interdict, the entering of the port should be considered by the Master unsuitable by reason of disease, war, or disturbances, he is to have the option of landing the goods at any other port, which he may consider safe, at shipper's or consignee's risk and expense; and on the goods being placed being put into the port addressed the goods to be at shipper's or consignee's risk and expense, and the master and owner discharged from all responsibility. The Carrier shall reserve the right, in event of any trouble arising between the Company and any of the Central American Republics to store the cargo at the risk and expense of owner, shipper, and/or consignee until such time as it may be convenient to carry the same forward for delivery.

14. The Carrier shall retain on said property for all fines imposed on it and for all expenses incurred by the shipper, owner or consignee, and for all expenses of Custom House papers in due time or resulting from other errors or omissions of shipper, and all such fines and expenses shall be reimbursed to Carrier by consignee before the goods are delivered to him.

15. It is agreed that the property covered by this bill of lading is subject to all conditions expressed in the regular forms of bills of lading in use by the connecting steamship company at time of shipment, and to all local rules and regulations of the port of destination, not expressly provided for by the clauses hereon.

16. It is agreed that this bill of lading, duly endorsed, shall be given up to the last carrier, if required, in exchange for delivery order.

17. That merchandise on wharf or in warehouse awaiting shipment, transshipment or delivery be at owner's risk of loss or damage by fire, flood and/or the giving away, falling or falling in, or in wharf, or in warehouse, or in wharf, or in wharf or any structure thereon, not happening through the fault or negligence of carrier or representative.

18. It is expressly stipulated and agreed that the Panamanian Atlantic Steamship Company shall not be liable for destruction of or damage to goods or fire while upon its vessel, or before loading thereon or after unloading the same therefrom, unless such fire is caused by the design or neglect of said Company.

19. In the event of any cargo being accepted and carried with freight charges referred to destination and if through inattention of consignee or any other cause whatsoever, such Cargo or any part thereof is refused by the connecting carriers, and the Carrier having such Cargo in possession at the time of such refusal is compelled to return the same to the port of origin or otherwise dispose of the same, all freight and other charges and all expenses of every nature whatsoever, that may be reasonably incurred in the rehandling and/or discharge of said Cargo, shall be a charge and lien upon and against said Cargo, payable by the Shipper, Owner or Consignee, prior to taking delivery or effecting reshipment of such Cargo.

20. It is further mutually agreed that all questions arising under this bill of lading are to be governed by the laws of the country of the carrier to whose acts such questions are attributable.



[Endorsed]: No. 15660. U. S. Dist. Court, Nor. Dist. of Cal. Pltff. Exhibit 2. 5/22/14. W. B. M. Clerk.

No. 3037. U. S. Circuit Court of Appeals for the Ninth Circuit. Plaintiff's No. 2. Filed Aug. 24, 1917. F. D. Monckton, Clerk.



**Plaintiff's Exhibit No. 3—Notice of Abandonment.**

**NOTICE OF ABANDONMENT.**

To the Fireman's Fund Insurance Company of San Francisco.

Gentlemen:—

Please take notice: That the Trojan Powder Company, insured in the sum of Thirty-five Thousand 00/100 Dollars under your policy No. 307,264, dated August 7th, 1912, on Six Thousand Cases High Explosives laden on board the Ship or vessel called the Steamer "Pleiades," hereby abandons the said Six Thousand cases High Explosives laden on said vessel to your Company and claims of you as for a total loss under said policy.

The foregoing abandonment is made because the said Steamer "Pleiades" laden with said explosives on or about the 16th day of August, 1912, while on a voyage from San Francisco Bay to Balboa was wrecked at or near Cape San Lazaro—Lower California, as the result of which the said Six Thousand cases of High Explosives became and are a total loss.

Dated San Francisco, August 29, 1912.

**TROJAN POWDER COMPANY.**

By W. P. MULHEM,

Manager.

[Endorsed]: Notice of Abandonment. Trojan Powder Company to Fireman's Fund Insurance Company of San Francisco. Case No. 3037. U. S. Circuit Court of Appeals for the Ninth Circuit. Plaintiff's Exhibit No. 3. Filed Aug. 24, 1917. F. D. Monckton, Clerk. No. 15,660. U. S. Nor. Dist.

Court of Cal. Pltfs. Exhibit 3. 5/22/14. FDM.,  
Clerk.

Aug. 29th, 1912, 12.25 P. M.

Received the original, of which the within is a  
copy—Abandonment not however accepted.

FIREMAN'S FUND INSURANCE COM-  
PANY,

By C. A. & R. PAGE.

[Endorsed]: No. 3037. United States Circuit  
Court of Appeals for the Ninth Circuit. Fireman's  
Fund Insurance Co. vs. Trojan Powder Company.  
22 Orders Under Rule 16 Enlarging Time to August  
31, 1917, to File Record Thereof and to Docket Case.  
Refiled Aug. 22, 1917. F. D. Monckton, Clerk.

No. 3037 12

IN THE  
**United States Circuit Court of Appeals**  
**For the Ninth Circuit**

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FIREMAN'S FUND INSURANCE COMPANY  
(a corporation),  
*Plaintiff in Error,*  
VS.

TROJAN POWDER COMPANY (a corporation),  
*Defendant in Error.*

**BRIEF FOR PLAINTIFF IN ERROR.**

---

EDWARD J. McCUTCHEN,  
IRA A. CAMPBELL,  
McCUTCHEN, OLNEY & WILLARD,  
*Attorneys for Plaintiff in Error.*

FILED  
MAY 10 1912  
U. S. DISTRICT COURT  
SAN FRANCISCO, CALIF.





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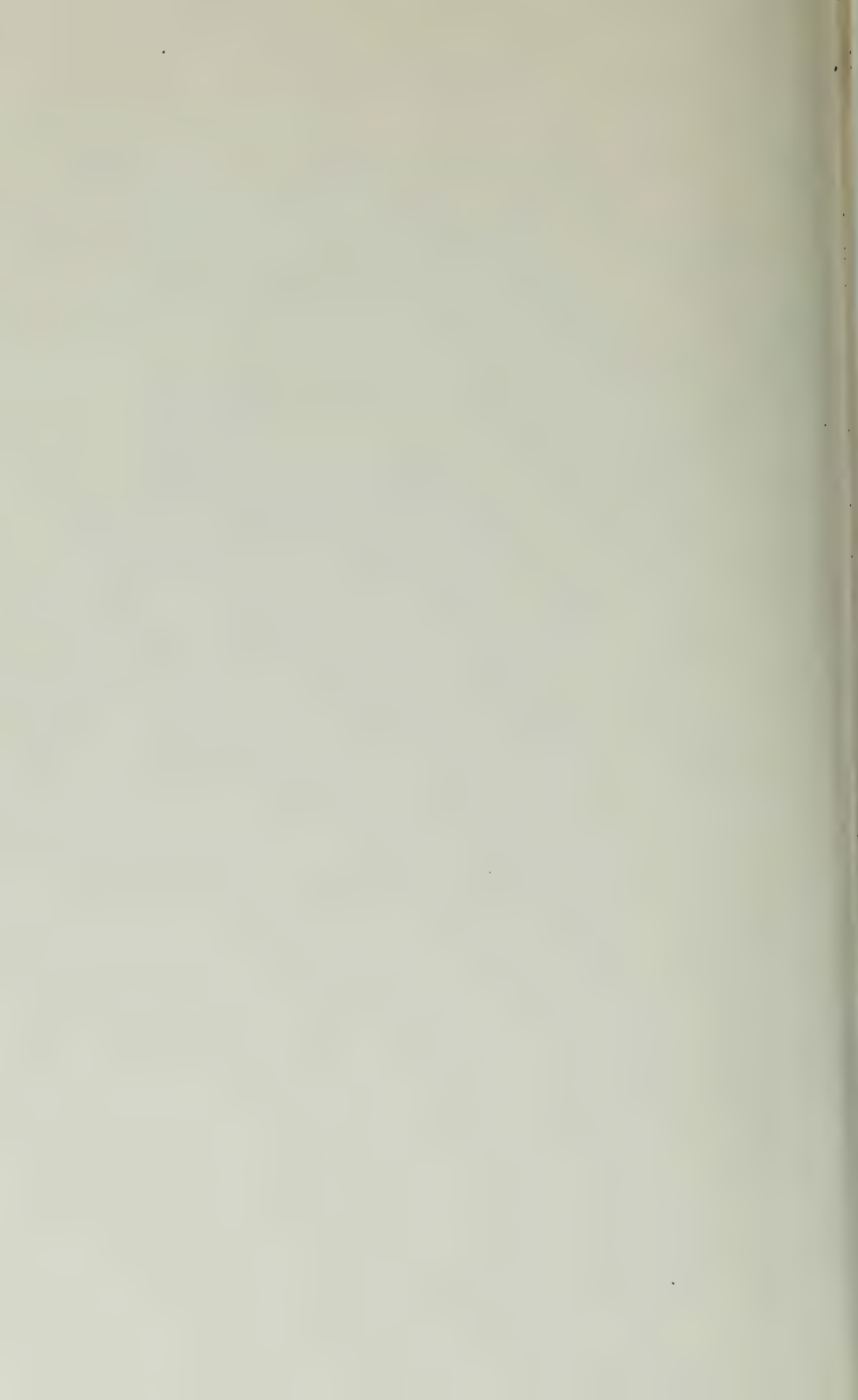
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No. 3037

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

FIREMAN'S FUND INSURANCE COMPANY

(a corporation),

*Plaintiff in Error,*

vs.

TROJAN POWDER COMPANY (a corporation),

*Defendant in Error.*

## BRIEF FOR PLAINTIFF IN ERROR.

### I.

#### Statement of the Case.

A consignment of 6000 cases of high explosives, belonging to the defendant in error (plaintiff below), left San Francisco for Balboa, Panama, on the steamer "Pleiades" on August 7, 1912. The "Pleiades" stranded off the coast of Mexico on August 16, 1912, but was safely floated and returned to San Francisco, arriving in September. The explosives were received by plaintiff, and were reshipped to Balboa on October 17, 1912, on the "Mackinaw", another steamer owned and operated by the California-Atlantic Steamship Company, which also owned the "Pleiades". The plaintiff,

having prepaid its freight amounting to \$4950 for the shipment on the "Pleiades" and its contract of af-freightment in that instance having contained a provision that the freight should be deemed earned, "vessel or goods lost or not lost", assented to the demand of the steamship company, and paid out an additional \$4050 for the reshipment on the "Mackinaw". The action was to recover from the defendant on its said policy for the \$4050 so paid. The District Court allowed recovery, and the defendant brings error.

The repairs on the "Pleiades" were completed on December 27, 1912, and on that date she was turned over to the steamship company. The company however, went into bankruptcy on or about January 2, 1913, and the voyage was not completed.

The policy sued on, was a policy of marine insurance in the form known as the "English form". It contained, among others, the following provisions:

" \* \* \* the said INSURANCE shall and is INSURANCE (lost or not lost) at and from San Francisco Bay to Balboa.

"And it is ALSO agreed and declared that the subject matter of this Policy as between Assured and the said Company so far as concerns this Policy shall be and is as follows upon \$35,000—on 6000 cases High explosives.

"laden (under deck) on board the ship or vessel called the Str. 'Pleiades'. \* \* \*

" \* \* \* All questions of liability arising under this policy are to be governed by the laws and customs of England. This Policy is issued in duplicate. Freight warranted free from any claim consequent upon loss of time whether arising from the peril of the sea or otherwise. \* \* \*

“Warranted free from average unless general or the ship or craft be stranded, \* \* \*

“Underwriters notwithstanding this warranty to pay for any damage caused by \* \* \* reshipping or forwarding for which they would otherwise be liable \* \* \* .”

The provision with reference to the prepayment of freight, contained in the bill of lading under which the explosives were shipped on the “Pleiades”, read as follows:

“It is agreed that said freight, whether prepaid or to be collected, is to be considered as earned, vessel or goods lost or not lost at any stage of the entire transit; that on the happening of any of the herein provided contingencies, the carriers are to have the right to forward the above mentioned packages to the ports of destination on their own routes, and shall receive extra compensation for such service, whether performed by their own vessels or those of strangers; \* \* \* ”

No evidence was offered that this bill of lading was ever brought to the notice of the defendant (plaintiff in error), or that the defendant in fact had notice of its terms or particularly of the provision as to the prepayment of the freight, “goods lost or not lost”.

The circumstances under which the 6000 cases of explosives were reshipped after their return to San Francisco on the damaged “Pleiades”, and the reasons for such reshipment were testified to by Mr. W. P. Mulhern, the manager of the plaintiff company. According to Mr. Mulhern, the explosives were returned to San Francisco in September—sometime after September 7, 1912,—and in behalf of the plaintiff company, he at once took steps to see that they should be reshipped to

Panama on the first steamer leaving for Balboa (Tr. p. 53). The "Mackinaw", which was to sail on October 17, 1912, was the first vessel leaving San Francisco for Balboa after the return of the explosives. Mr. Mulhern arranged for the transportation of the explosives on the "Mackinaw", and upon the refusal of the California-Atlantic Steamship Company to transport the explosives on this vessel without additional charge, paid the \$4050. The "Pleiades" was repaired, and redelivered to the California-Atlantic Steamship Company on December 27, 1912. On or about January 2, 1913, the plaintiff company received word that the steamship company had gone into bankruptcy (Tr. p. 54).

The reasons given by Mr. Mulhern for the immediate reshipment of the explosives on the "Mackinaw" without awaiting the completion of the repairs to the "Pleiades" were: first, that under the contract which the plaintiff company had for the sale of the explosives in Panama, the plaintiff would be subject to a penalty for the delay in their arrival, and would further be subject to the possibility of having the contract cancelled for such delay; and, secondly, that the plaintiff company feared that should the delay result in such cancellation, no other market could be found for the explosives upon their arrival in Panama. The contract which the plaintiff company had for the sale of the explosives in Panama was with the Panama Canal Commission, and Mr. Mulhern stated that, in his opinion, no purchaser other than the Commission could be found for the explosives, should it become necessary to put them on the market on their arrival in Panama.



The testimony of Mr. Mulhern on this subject was very direct and very brief, and was as follows:

“MR. FRANK. What was the necessity of getting that cargo forwarded at that time?

“A. If we did not deliver it within a certain time we were subject to a penalty of one-tenth of one per cent per day and were liable to have the shipment refused. Upon the condition their contract provided for that.

“I don't believe there is any market at the port of destination other than the Panama Canal Commission for any considerable amount of explosives, and particularly, for those grades, as one of them was a grade of 45% and the other 60, and the demand for 60 is not nearly as great as the lower grades” (Tr. p. 54).

With the exception of the testimony of Mr. Mulhern as to the foregoing points and as to the service by the plaintiff on the defendant of an attempted abandonment, no testimony was offered by either party except as bearing upon the question as to what constituted the English law.

The plaintiff contended, and the District Court held, that under the law of England, the amount paid by the plaintiff for the reshipment of the explosives on the “Mackinaw” could be recovered as a “Particular Charge”. In other words, it was contended by the plaintiff and held by the court, that the stranding of the “Pleiades” was a peril insured against by the policy, and that the payment of \$4050 was a loss proximately resulting of such stranding, and therefore recoverable.

Plaintiff in error contends that the District Court erred in these conclusions, for the following reasons:

1. Because, under the law of England, reshipment charges cannot be recovered against the underwriter as a "particular charge" *unless they are incurred in order to prevent a loss for which the underwriter otherwise would be liable*; and because in this case it clearly appeared that the reshipment on the "Mackinaw" was not necessary to prevent a loss for which the underwriters would be liable.

2. Because, neither the stranding of the "Pleiades", nor any other peril of the seas insured against, was the proximate cause of the payment of the \$4050 reshipment charge. Under this last heading, plaintiff in error contends that other intervening causes, occurring after the stranding of the "Pleiades", and after its arrival in San Francisco, were responsible for the reshipment on the "Mackinaw", and the consequent payment of the \$4050 reshipment charge, and that none of these intervening causes were insured against by the policy.

Under the law of England, as fully developed by the authorities cited, the rule of *causa causans*, although applicable to other kinds of contracts, does not apply to contracts of marine insurance. With respect to contracts of marine insurance "only the *causa proxima* can be regarded".\*

Upon this branch of the case, plaintiff in error contends that neither the stranding of the "Pleiades" nor any other peril of the sea insured against, was the last or proximate cause of the reshipment on the "Mackinaw", or the payment of the reshipment charges. The

\* See opinion of Lord Esher in *Pink v. Fleming*, 25 Q. B. D. 396, quoted *infra*.

“Pleiades” returned to port with the cargo safely in her hold, and was, in fact, repaired and ready to proceed with the voyage on December 27, 1912. Therefore, one of two additional causes, wholly disassociated from the original stranding (the effects of which were shown to have been totally overcome by December 27, 1912) were responsible for the reshipment, and the payment of the additional reshipment charges.

The first of these intervening causes was the fact that by reason of its contract with the Panama Canal Commission, the plaintiff considered itself unable to await the completion of the repairs upon the “Pleiades”. The insurance company was without knowledge of the terms of the contract between the plaintiff and the Canal Commission, was not bound by it, and was moreover, under the express terms of its policy, as well as by reason of the law of England in that behalf, not liable for any delay in the arrival of the goods at the port of destination, even though such delay might have been proximately caused by a peril insured against. Therefore, under the policy (at least so far as regards its liability for reshipment charges) the insurance company was entitled to have the explosives remain in San Francisco until the repairs upon the “Pleiades” were completed, and if this was rendered impossible by reason of the necessities of the plaintiff, arising out of its contract with the Panama Canal Commission, the proximate cause of the payment of the reshipment charges was not the stranding of the “Pleiades”, nor any other peril insured against, but was the necessity of the plaintiff as aforesaid.

The second intervening proximate cause of the reshipment charges may, on the other hand, be said to have been the bankruptcy of the California-Atlantic Steamship Company. Had the "Pleiades" been repaired, she would have completed the voyage to Balboa, or at least she would have been under obligations to the defendant to complete said voyage, and if she did not, the California-Atlantic Steamship Company could not have recovered or exacted the additional freight charges from the powder company.

Furthermore, if the California-Atlantic Steamship Company had wrongfully refused to carry the cargo on the "Pleiades", the prepaid freight could have been recovered by plaintiff.

Under this heading we shall therefore argue as follows:

(a) That under the law of England in cases of marine insurance, only *the causa proxima* can be regarded to determine whether a given item of loss has been caused by a peril insured against.

(b) That an intervening proximate cause of the payment of the reshipment charges was the plaintiff's contract with the Panama Canal Commission, which was a matter not insured against.

(c) That an intervening proximate cause of the payment of the reshipment charges was the plaintiff's desire to avoid delay in the arrival of the goods at Balboa, and that such delay in arrival and any damage resulting therefrom was not a matter insured against.



(d) That the insolvency of the California-Atlantic Steamship Company was also an intervening proximate cause of the payment of the reshipment charges, and that such insolvency was not a matter insured against.

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## II.

### Specifications of Error.

The points relied upon on this writ are covered by assignments in error as follows:

The court erred in not holding that the reshipping charges on the "Mackinaw" were not recoverable as "particular charges" under the policy, for the reason that they were not shown to have been incurred in order to prevent a loss for which the underwriters would otherwise have been liable (Assignments XXVII and XXVIII).

The court erred in not refusing plaintiff a recovery upon the ground that the reshipment upon the "Mackinaw" and the consequent payment of the reshipment charges were not the proximate results of the stranding of the "Pleiades" or of any peril insured against (Assignments of Error IV, X, XIII, XV and XXI).

The court erred in not holding that the payment of the reshipment charges was voluntary in so far as the defendant was concerned, the defendant not having had notice of the provisions of the bill of lading, and not being bound by the provisions contained in the bill of lading that the freight should be deemed earned by

the "Pleiades" goods lost or not lost (Assignment VIII, XX and XXIV).

The court erred in not holding that the necessity for the reshipment on the "Mackinaw" arose out of the necessity created by plaintiff's contract for the sale of the explosives to the Panama Canal Commission, and not out of the stranding of the "Pleiades," and that for that reason, defendant was not liable (Assignments XI, XVIII, XXV and XXVI).

The court erred in refusing to hold that the proximate cause of the reshipment on the "Mackinaw" and the incurring of the additional reshipment charges was the desire of the defendant to avoid delay in the arrival of the goods at the port of destination, and that defendant was not liable for the consequences of any delay in such arrival, and was therefore not liable for such reshipment charges (Assignment XXVI).

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### III.

#### **The Argument.**

The argument in behalf of the plaintiff in error is divided into two main points:

First, that under the authorities presented to the District Court, reforwarding or reshipment charges cannot be recovered against an underwriter as a "particular charge" or under the "sue and labor" clause, unless they have been incurred in order to prevent a loss for which, under the terms of the policy, the underwriter otherwise would have been liable.

Second, that in any event the reshipment of the explosives upon the steamer "Mackinaw" by the plaintiff without awaiting the completion of the repairs upon the "Pleiades", was not the proximate result of the stranding of the "Pleiades", but was the result of the necessity under which the plaintiff found itself to carry out the contract which it had with the Panama Canal Commission, and of the plaintiff's desire to avoid delay in the performance of that contract.

We shall take these two matters up in order.

(1)

**THE \$4,050 RESHIPMENT CHARGES ON THE "MACKINAW" COULD NOT BE RECOVERED BY DEFENDANT AS A "PARTICULAR CHARGE" BECAUSE, UNDER THE LAW OF ENGLAND FORWARDING OR RESHIPMENT CHARGES ARE ONLY RECOVERABLE WHERE IT IS SHOWN THAT THEY ARE MADE IN ORDER TO AVOID A LOSS WHICH WOULD OTHERWISE FALL UPON THE INSURER.**

The basis upon which the trial court determined the English law applicable to the case, was made up of certain sections of the English Marine Insurance Act, supplemented and interpreted by various text writers and English decisions. The determinations by the District Court on the question of the English law were therefore merely conclusions of law, and are reviewable on this writ of error.

*The Maritime Insurance Co. v. M. S. Dollar Steamship Co.*, 177 Fed. 127;

*Mexican National Ry. v. Slater*, 115 Fed. 593-608; also 194 U. S. 120;

*Consequa v. Willings*, 1 Peters C. C. 225; Fed. Cas. 3128;

*Story's Conflict Laws*, Sec. 638;

*Greenleaf on Evidence*, Sec. 468;

*Wigmore on Evidence*, Par. 2558;

13 *Am. and English Encyclopedia of Law*, (2nd ed.) 1078.

The English statutes and authorities wholly fail to establish, as contended by plaintiff, and held by the District Court, that when a vessel returns in safety to the port of departure, forwarding charges to the port of discharge may be recovered against the underwriters under the circumstances shown and admitted to exist in the present case.

- (a) Plaintiff claimed recovery of the \$4050 as a particular charge. "Particular charges" are, under the English law, on the same footing as recoveries under the sue and labor clause.

Plaintiff offered text writers and other authorities to prove that "particular charges" as distinguished from "particular average" might be recovered against the underwriters.

*Arnould on Marine Insurance*, (8th ed.) Sec. 214 (Tr. p. 56);

*Arnould on Marine Insurance*, (8th ed.) Sec. 869 (Tr. p. 57);

*Kidston v. Empire Insurance Co., Ltd.*, 1 Com. Pleas, L. T. 535; 14 English Ruling Cases 246.

The theory under which the recovery was allowed in this case was, therefore, that the payment of the



\$4050 was a "particular charge" and partook of the nature of particular average. Particular charges are not, however, included in particular average under the express provisions of the English Marine Insurance Act.

Section 64 of the English Marine Insurance Act provides as follows:

"(1) A particular average loss is a partial loss of the subject-matter insured, caused by a peril insured against, and which is not a general average loss.

(2) Expenses incurred by or on behalf of the assured for the safety or preservation of the subject-matter insured, other than general average and salvage charges, are called particular charges. *Particular charges are not included in particular average.*"

It follows that particular charges partake of the nature of recoveries under the sue and labor clause, and are subject to the rule that they must only include expenditures which tend to prevent a loss for which recovery otherwise might be had against the underwriters.

(b) The authorities cited show that under the English law, expenditures for reshipment may only be recovered against the underwriters in those cases where they are made to prevent a loss for which the underwriters would otherwise be liable under the terms of the policy.

We shall call the court's attention first to the English case in which the facts were sufficiently similar to those involved in the cases at the bar, to make it afford a clear illustration of the rules which we contend

should have been applied by the District Court in the present case. In this case the transshipment occurred, not from the point at which the voyage had been interrupted, but after the vessel had returned to the port of departure, and the provisions of the policy sued upon contained nothing to differentiate it from the policy here under consideration.

*Great Indian Peninsula Ry. Co. v. Saunders*, 1 Ellis, Best & Smith, Q. B., 41; 121 English reprint 630.

The plaintiff had shipped a consignment of rails from London to Bombay upon the ship "Bombay". On November 2, 1858, the plaintiff paid in advance to the owners of the "Bombay" the sum of £629, 9s 10d, being the whole of the freight. On November 11, 1858, the plaintiffs effected a policy of insurance upon the rails with Lloyds, for the sum of £4500. Soon thereafter, the "Bombay" sailed, but encountered heavy weather and was compelled to put back to Plymouth in a disabled condition. She arrived in Plymouth December 25, 1858, and was so badly damaged that it became necessary to abandon the voyage. The plaintiffs thereupon took the rails from the "Bombay", sent them to London, and from there had them reshipped to Bombay upon three other vessels, paying therefor additional freight aggregating £825, 11s, 7d. They thereupon sued the underwriters to recover the amount of this extra payment.

The Court of Common Pleas gave judgment for the defendant, the first ground of the decision being that the policy contained a warranty against particular

average. The plaintiffs, however, contended that although they were foreclosed from recovering the reshipment charges as particular average, they could nevertheless recover them under the "sue and labor" clause contained in the policy. The answer which Blackburn, J., made to this contention, was to all intents and purpose identical with that which is made by the defendant in the case at bar. It was pointed out *that the goods had been returned in an unharmed condition and that they were in no danger of suffering any loss for which the underwriters might be made liable under the policy.* For that reason, the court said, the underwriters could not be held liable for the reshipment charges. Blackburn, J., said:

"It was, however, further argued by Mr. James that the plaintiffs were entitled to recover under the clause which authorizes the insured to sue and labor for the preservation of the subject-matter of the insurance. It is not necessary to decide whether an underwriter on a policy against total loss only is, (60) under this clause, liable for expenses incurred by the assured for the purpose of rescuing the subject-matter of an insurance from a state of peril which might have resulted in a total loss, but did not. There are reasons both for and against this stated by Mr. Phillips in his *Treatise on Insurance*, Sec. 1777; and the question seems never to have been actually decided. But in the present case it does not arise. The expenses here were incurred for the purpose of forwarding the subject-matter of insurance to its destination, at a time when the iron was not in any peril of total loss, either actual or constructive. Had the insured chosen, instead of paying this extra freight, to sell the rails in England, as he might have done if he pleased, he could have made no claim on the underwriters; for it would not

have been a constructive total loss, according to *Rosetto v. Gurney*, 11 C. B. 176 (E. C. L. R., Vol. 73), unless the amount of the extra freight exceeded the value of the goods when forwarded which is not the case here; and an actual total loss is out of the question."

The case was appealed and the judgment for the defendant was affirmed.

*Great Indian Peninsula Railway Co. v. Saunders*,  
2 Best & Smith Rep. (Q. B.) 266.

On the appeal the argument was again made by the plaintiff that the expenses of the reshipment could be recovered under the "sue and labor" clause, and the Higher Court answered the contention in the same manner in which it had been met in the lower court, Erle, J., saying:

"But Mr. James ably argues that the plaintiffs are entitled to recover this money; not as compensation for the loss of the goods within the general language of the policy; but as the expense of forwarding them to their destination in other vessels, under what has been called 'the labour and travel clause', which empowers the assured to sue, labour, and travel to save the thing assured from impending loss. The substantial ground, however, on which I decide this case is entirely beside his able argument. The expenses that can be recovered under the suing, labouring and travelling clause are expenses incurred to prevent impending loss within the meaning of the policy. Now, here the goods were given up to the plaintiffs in perfect safety; and the question is, were these expenses incurred to prevent a total loss? Had the owners a right to turn the transaction into a total loss?



Certainly not, for they had the goods in specie, and consequently that £825 11s. 7d. had no reference to suing, labouring, or travelling in order to prevent such a loss."

It cannot be said that the authority of the case just cited is destroyed, because of the fact that the policy involved in it contained a warranty against particular average. The policy involved in that case was practically identical with the policy involved in the case at bar. *It was a policy upon cargo and not upon freight.* This being the case, the English court held that when the cargo was safely restored to the port of departure, the underwriters could not be made liable for additional reshipment expenses to the ultimate port of destination.

This point is deserving of the court's most careful consideration for the reason that in the cases relied upon most strongly by plaintiff, *the policies were upon freight*, or *upon freight* as well as cargo, and for that reason the underwriters could be held responsible to the assured unless the cargo actually arrived at the port of destination.

In only one of the other cases offered in the District Court did it appear that the insured cargo was actually returned to the port of departure and reshipped therefrom. Plaintiff in the court below placed great reliance upon this case. It was, however, clearly distinguishable from the case at bar owing to the peculiar state of facts involved, and particularly owing to the fact that the

policy expressly covered the assured against all forwarding charges.

*Popham and Willett v. The St. Petersburg Ins. Co.*, 10 Com. Cas. 31;

*Popham and Willett v. The St. Petersburg Ins. Co.*, 10 Com. Cas. 276.

The policies involved in this case were not ordinary English form policies, but were contracts of insurance of an unusual type, drawn for the purpose of covering a peculiar mercantile adventure. The plaintiffs had for several years prior to 1899, successfully imported cargoes of merchandise into Siberia, via the Kara Sea, their purpose in choosing such a route being the saving of the excessive duties which were involved by import into Siberia through western Russia. In 1899 the plaintiffs proposed such an expedition, and sent out upon it four steamers which they chartered, and one which they owned. These steamers were laden in part with goods owned by the plaintiffs, and in part with goods which were owned by other persons. The plaintiffs, however, made freight charges both against the goods owned by outside parties, and against their own goods. They thereupon insured themselves, both for the freight which was to be earned and also, for the goods contained in the vessels, whether belonging to themselves or to other shippers. The nature of the insurance was therefore dual—it was insurance *upon freight* and also insurance upon cargo. It was moreover insurance of a peculiar type in effect designed to insure the success of speculative venture—to insure to plaintiffs the realization of their profit upon the

earning of the freight, the success of their venture, and, as well, the safety of the goods. Owing to the subject matter of the insurance, therefore, the ultimate arrival of the goods at the port of destination was insured against, whereas in the ordinary English form policy of insurance upon goods alone as distinguished from freight, the ultimate arrival of the goods at the port of destination was not insured against.

The specific ground upon which the case is distinguishable however from the case at bar, lies in the fact that the policies involved contained the following provision:

*“To pay landing, warehousing, and forwarding charges, should the same be incurred, as well as partial loss arising from transshipment and re-shipment.”*

The vessels proceeded to the Siberian coast, but, in August of 1899, they encountered ice drifts caused by an unusual prevalence of northeasterly winds. As a result, four of the vessels were damaged, and one was lost, and the goods were all returned to London. They were thereafter reshipped to Siberia through Russia, and large reshipment charges were incurred as well as heavy charges for duties. The plaintiff sued on the policies to recover for the landing, warehousing, and forwarding expenses, and for the extra duties.

In the first report of the case (10 Com. Cases 31), Walton, J., held that the weather conditions which led to the loss were perils constituting a peril insured against under the policies; that the plaintiffs could not recover for a constructive total loss because of their

failure to give notice of abandonment; and lastly, that the warehousing and forwarding charges, and the extra duties, could be recovered as partial losses. This holding, however, rested necessarily upon the proposition that the policies expressly insured the matters for which recovery was allowed under the clause above quoted from the policies. The second report of the case (10 Com. Cas. 276) simply involved a dispute as to the details of the recovery allowed under the first judgment. In the second report however, it appears that the plaintiffs were allowed to recover for the profits on freight which they would have realized had the first voyages been successful, which emphasizes the point that in the policies under consideration the subject matter of the insurance was such that the ultimate arrival of the goods at destination was guaranteed by the insurer and not alone the safety of the goods. In no way can this case be deemed authority applicable to the situation presented to the case at bar.

In fact, plaintiff's only contention in the District Court was that the case was authority for the proposition that the second shipment was a part of the original forwarding of the goods. A complete answer to this contention is found in the provision of the policy above quoted. Under such provisions the insured were insured against forwarding charges, should the same be insured, *as well as* partial loss arising from transshipment and reshipment. The insured were protected, not only against "transshipment" charges, but also "reshipment" charges as distinguished from transshipment charges. It cannot be said that a policy, made



under circumstances shown to have existed in that case, and containing such express equivocal language with respect to the very subject-matter of reshipment charges, is to be deemed authority with reference to a policy in the ordinary English form with no express provisions whatever with respect to reshipment. The case of *The Great Indian Peninsula Railway Co. v. Saunders*, supra, stands uncontradicted as authority for the proposition that under such a policy, the reshipment of the goods, after they had been returned safely to their home port, does not create a charge which is recoverable against the underwriters.

*Booth v. Gair*, 15 Com. Bench Reps. (N. S.) 290.

The plaintiffs shipped a consignment of bacon from New York to Liverpool. Upon leaving New York the vessel met heavy gales, and was compelled to put in at Bermuda, where she became a total loss and was sold. The bacon was taken from the vessel in an undamaged condition, and the master transshipped it from Bermuda to Great Britain, and prepaid reshipment charges which exceeded the amount of the freight agreed to be paid. The plaintiffs had insured the bacon with the defendant under a policy which was warranted free of particular average, and which contained an ordinary "sue and labor" clause. Upon arrival of the cargo in England, the plaintiffs sued the defendant for the difference between the amount of freight which they had agreed to pay on the first vessel, and the larger amount which they were compelled to pay by reason of the reshipment. It was held upon the authority of *Great Indian Peninsula Railway Co. v. Saun-*

ders, supra, that the plaintiffs could not recover. Erle, C. J., who delivered the opinion to the court, again placed his judgment upon the fact that the re-shipment was not for the purpose of avoiding any loss which, under the policy, might have otherwise fallen upon the underwriters, saying:

“What the master did in this case was in discharge of his duty in ordinary course; and there was no peril creating a risk of a total loss from which the underwriter was saved by the expenses in question. There were no other perils than such as are always attendant on the transit of goods by the voyage in question.

“If the assured intended to confine the warranty to a partial loss from damage to the cargo, and to have the liability of the underwriter for expenses of transshipment, in our opinion this policy does not express that intention. Judgment for the defendant.”

The case of

*Kidston v. The Empire Marine Insurance Co., Ltd.*, 1 Com. Pleas L. R. 535; 14 English Ruling Cases, 247,

in which a recovery was allowed under the “sue and labor” clause, contains many points which distinguish it from the case at bar, but none the less affords striking proof that the English rule *prevents the recovery of reshipment charges except where they are shown to have been incurred for the purpose of preventing a loss for which the underwriters would otherwise be liable.*

In that case, the plaintiffs, being the owners of the ship “Sebastopol,” chartered her to Messrs. Thomson

& Co. for a voyage to the Chincha Islands, off the western coast of South America, for the purpose of bringing a cargo of guano from said islands to England. The freight was to be payable, £1000 upon the arrival of the "Sebastopol" at the port of discharge in England, and the balance "48 hours after the true and right delivery of the whole cargo". Plaintiffs then took out insurance with the defendants, and what they insured was not the cargo, (plaintiffs did not own the cargo) *but was the freight which was to become due them from Messrs. Thomson & Co. when the vessel arrived at port of discharge, and later discharged the cargo.*

It is clear that for this reason alone the case is completely distinguishable, both from the case of *Great Indian Peninsula Railway Co. v. Saunders*, supra, and from the case at bar, because what the underwriters were undertaking was that the insured should receive their freight money, and obviously the insured could not receive his freight money unless the cargo of guano arrived and was discharged in England. In other words, the subject-matter of the contract of insurance involved in the case of *Great Indian Peninsula Railway Co. v. Saunders*, supra, was the consignment of rails, and in the case at bar, was the consignment of 6000 cases of high explosives, whereas in the case now under discussion, the subject of insurance was the *freight money to become due to the owners of the "Sebastopol" when the "Sebastopol" arrived and discharged its cargo.* This was expressly pointed out by the Appellate Court when the case was heard on appeal, Kelly, C. B., saying:

“The cases of *Great Indian Peninsular Railway Co. v. Saunders*, and of *Booth v. Gair* have been pressed upon the attention of the court, as showing that a loss of this nature is a partial loss only, and cannot be recovered against the underwriters by reason of the warranty against particular average. *But these were cases of insurance upon goods, to which the pro rata doctrine has no application, and where, the whole or a great portion of the goods still existing in specie, it was impossible to hold that a total loss had arisen. And Mr. Justice Blackburn appears to have marked the distinction between the case of goods and that of freight, and forbore to intimate any opinion upon the point which we now have to determine.*” (Italics ours.)

The “Sebastopol” proceeded to the Chincha Islands, received the cargo of guano on board, but met with heavy weather coming through the Straits of Gibraltar, and was compelled to put in at Rio Janeiro, where she became a total loss. The master thereupon transshipped the cargo of guano on the ship “Caprice”, which carried it safely to England. The cost of the reshipment of the guano on the “Caprice” was £2467, 11s, 10d. The court held that notwithstanding the warranty against particular average which the policy contained, the cost of reshipment was recoverable under the “sue and labor” clause in the policy. Particular emphasis was put however, upon the fact that the subject matter of the insurance was the freight moneys, Willes, J., saying:

“As to the first question, it was hardly disputed that the expenses incurred were of a character to be within the clause. *Without incurring them the subject-matter of the insurance never would have had any complete existence.* They were incurred in order to earn it; and they represented so much



labour beyond and besides the ordinary labour of the voyage, *rendered necessary for the salvation of the subject-matter of insurance*, by reason of a damage and loss within the scope of the policy, the immediate effect of which was that the subject-matter insured would also be lost, or rather would never come into existence, unless such labour was bestowed. As the goods lay at Rio, *no part of the chartered freight had accrued due*, and no freight even *pro rata itineris* could have been claimed by the shipowner.” (Italics ours.)

The controlling element in the mind of the court in permitting the recovery of the transshipment charges on the “Caprice”, was the fact that those expenses prevented a loss for which, had the cargo of guano not gone forward, the freight would not have been earned and the defendant would have been liable to the plaintiff therefor. The court said:

“ \* \* \* the measures taken by the plaintiff to avert that loss, and the expense incurred therein, were taken and incurred for the benefit of the underwriters, in averting a loss for which they would have been liable; and so that they were within the suing and labouring clause, and that the underwriters are liable to contribute thereto.”

The same conclusion and the same reasoning were followed when the case was affirmed on appeal.

*Kidston v. Empire Marine Insurance Co.*, 2 Com. Pleas L. R. 357.

The appellate court said, speaking through Kelly, C. B.:

“ \* \* \* on the destruction of the ship and the landing of the cargo at Rio there was a total loss of the freight, unless it could be averted by the forwarding of the cargo by another ship to Great Brit-

ain; that the forwarding the cargo by the 'Caprice' was a particular charge within the true meaning of the suing and labouring clause \* \* \* ; and that the due proportion of that particular charge, that charge being thus within the suing and labouring clause, *and incurred for the benefit of the underwriters to preserve the subject of insurance*, and to prevent a total loss, is recoverable under the policy in this action." (Italics ours.)

Another application by the English courts of the rule that only expenditures which avert a loss recoverable against the underwriters can be recovered as particular charges or as recovery under the "sue and labor" clause, is found in the case of

*Meyer and Others v. Ralli and others*, III Aspinall's Maritime cases, 324.

The plaintiffs insured 18,759 kilogrammes of rye on a voyage in the Austrian ship "Unico", from Enos, a Turkish port, to Schiedam, in Holland. The rye was insured by the defendants under a policy warranted free from particular average. The "Unico" sailed from Enos in November, 1865, and was shortly thereafter disabled in a storm off the coast of France, and was taken into port at La Rochelle, France. The vessel was tied up by various proceedings instituting the courts of France, and the cargo, after many months delay, was finally sold. The owners of the cargo brought suit on the policy to recover the various items of loss arising out of the failure of the voyage, expenses incurred, and losses sustained by reason of the small price which was received for the rye at La Rochelle, when it would have brought considerably more at Schiedam. The English

court held that the greater portion of the loss, including the difference between the amount realized on the grain and that which it should have brought, was not attributable to peril of the seas, but was attributable to error of judgment of the captain of the "Unico", who should have transshipped. Recovery was allowed, however, for the expenses to which the plaintiffs were put in connection with the sale of the grain, the court holding that such expenses were made for the purpose of avoiding and preventing a total loss, for which the underwriters would have been responsible.

The court even went to the extent of ordering a reference to determine just what items were recoverable under this head, holding that only such items as were incurred for the purpose of preventing a loss for which the underwriters might have otherwise been liable, were recoverable. Archibald, J., saying:

"A more difficult question is as to the amount of expenses recoverable under this head. This depends, in our opinion, upon the amount of expenses necessary to avert a total loss *for which alone the defendants were liable.*" (Italics ours.)

*Barker v. Blakes*, 9 East's Rep. 282.

This case was decided by Lord Ellenborough sitting in a *nisi prius* court in 1803. If in conflict with the cases above noted, it must be deemed to that extent overruled by them, and in any event, having been decided in a court of inferior jurisdiction, would be overborne by them.

Moreover, in the report of the case it is recited as follows:

“The court, from the extensive consequences involved in the determination of the general question, wished to have had the case argued again; but understanding that the value of the property was inconsiderable, and that the parties were disinclined to incur any further expense, they said they would consider of it, and give their opinion another time.”

The plaintiff had shipped a quantity of oil in August, 1803, on the steamer “Hannah” from New York to Havre de Grace, and had insured the oil for the voyage with defendant. The “Hannah” was an American ship, and on the voyage to France was arrested by a British privateer and taken to Bristol, where she was searched for contraband goods. Ultimately the “Hannah” was released and the cargo ordered restored to the use of the owners. In the meantime, however, war was declared between France and England and the port of Havre de Grace was closed by the English authorities. For this reason the commander of the “Hannah” refused to proceed with the voyage and it became impossible for the plaintiff to ship the oil to France. Under these circumstances the oil was sold in England, and the plaintiff sued the insurance company for his loss on the oil and for certain charges for freight and other expenses which had been imposed upon it by the English court. *Lord Ellenborough, C. J.*, held that the plaintiff was not entitled to recover a total loss owing to his failure to give a timely notice of abandonment, but permitted recovery for the amounts paid for additional freight expenses.

In view of the foregoing authorities, it is submitted that the English rule is unquestionably that reshipping



or forwarding charges cannot be recovered against the underwriters, either as particular average or as particular charges, or as a recovery allowable under the "sue and labor" clause, *unless such forwarding charges are incurred for the purpose of preventing a loss which would otherwise be incurred by the underwriters under the terms of the policy.*

It is submitted that the case of

*The Great Indian Peninsular Ry. Co. v. Saunders,*  
supra,

is directly in point, and that it should control the determination of this branch of the case. Inasmuch as the policy herein sued upon was a contract of insurance *upon specific goods, and not upon freight*, and inasmuch as the payment of \$4050 for the reshipment upon the Str. "Mackinaw" was not (even assuming it to have been proximately caused by the stranding of the "Pleiades") a payment for the purpose of preventing a loss for which the underwriters would otherwise have been liable, the District Court erred in permitting the plaintiff to recover.

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(2.)

**NEITHER THE STRANDING OF THE "PLEIADES" NOR ANY OTHER PERIL INSURED AGAINST, WAS THE PROXIMATE CAUSE OF THE PAYMENT OF THE RESHIPMENT CHARGES.**

Upon the first branch of the argument we have contended that the \$4050 reshipment charges, were not, under the law, recoverable against the defendant as a

particular average charge *for the reason that it was not paid in order to avoid the incurring of a loss which otherwise would have been recoverable under the policy.*

Assuming that the court should hold against us on this point, nevertheless we contend that plaintiff in error cannot be held liable for the payment of such reshipment charges. Under the English law, as thoroughly laid down by the authorities, only such losses are recoverable against the underwriters, *as are the proximate results of a peril insured against.* Upon this branch of the case we contend that the defendant is not liable for the payment of these charges *because the stranding of the "Pleiades" did not necessitate their payment.* Two other distinct causes intervened, making the reshipment necessary; first, the contract of the plaintiff with the Panama Canal Commission with the resulting necessity of the plaintiff to avoid delay in the performance of such contract; and secondly, the bankruptcy of the California-Atlantic Steamship Company, the owner of the "Pleiades", which resulted in the abandonment of the voyage. Neither of these last mentioned causes were insured against by the policy, and therefore plaintiff in error cannot be held liable.

- (a) Under the law of England in cases of marine insurance, only the *causa proxima* can be regarded in determining whether or not a given item of loss has been caused by a peril insured against.

In

*Pink v. Fleming*, 25 Q. B. D. 396,

Lord Esher, M. R., points out that under English law a stricter rule governs in applying the doctrine of prox-

imate cause in cases of marine insurance than in the case of ordinary contracts. He points out that while in the case of ordinary contracts the rule of *causa causans* governs, nevertheless in the case of marine insurance, the rule of *causa proxima* must control. In other words, Lord Esher holds, that in cases where two causes combine to produce a given loss, it is the last cause which must be regarded. Lord Esher states the rule as follows:

“In cases of marine insurance the liability of the underwriters depends upon the proximate cause of the loss. In the case of an action for damages on an ordinary contract, the defendant may be liable for damage, of which the breach is an efficient cause or *causa causans*; but in cases of marine insurance only the *causa proxima* can be regarded. This question can only arise where there is a succession of causes, which must have existed in order to produce the result. Where that is the case, according to the law of marine insurance, the last cause only must be looked to and the others rejected, although the result would not have been produced without them.”

In the case which was before the English court, there had been a collision, with the result that the ship had to be taken to port for repairs. Thereafter the insured goods were landed, and were injured by the way in which they were handled while being landed. What Lord Esher said in the portions of the opinion above quoted was in response to the argument that the collision, a peril insured against, “was the proximate cause of the damage to the goods.” Applying the rules which were laid down in the above language to the facts before him, Lord Esher said:

“Here there was such a succession of causes. First, there was the collision. Without that no doubt the loss would not have happened. But would such loss have resulted from the collision alone? Is it the natural result of a collision that the ship should be taken to a port for repairs, and that the cargo should be removed for the purposes of the repairs, and that, the cargo being of a kind that must be injured by handling, it should be injured in such removal? A collision might happen without any of these consequences. If it had not been for the repairs, and for the removal of the cargo for the purpose of such repairs, and for the consequent delay and handling of the fruit, the loss would not have happened. The collision may be said to have been a cause, and an effective cause, of the ship’s putting into a port and of repairs being necessary. For the purpose of such repairs it was necessary to remove the fruit, and such removal necessarily caused damage to it. The agent, however, which proximately caused the damage to the fruit was the handling, though no doubt the cause of the handling was the repairs, and the cause of the repairs was the collision. According to the English law of marine insurance only the last cause can be regarded. There is nothing in the policy to say that the underwriters will be liable for loss occasioned by that. To connect the loss with any peril mentioned in the policy, the plaintiffs must go back two steps, and that, according to English law, they are not entitled to do.”

A number of other English cases are presented in which intervening causes were in a similar manner held to prevent recovery.

*Powell v. Gudgeon*, 5 Maule & Selwyn’s Rep., 431.

The vessel, by reason of damage by peril of the sea, was compelled to put into port for repairs. The captain, being unable to obtain money for the necessary



repairs in any other manner, was compelled to sell a portion of the goods. Plaintiffs, the owners of the goods, sued their insurers to recover the loss sustained because of the sale of the goods. Lord Ellenborough held that the insurers were not liable because, while the peril of the seas and the injury to the ship created a situation which made it necessary for the vessel to be repaired, it did not proximately cause the sale of the plaintiffs' goods. That sale was occasioned by reason of the necessities of the captain, which constituted a separate intervening, proximate and last cause, and not covered by the insurance policy. Lord Ellenborough adopted exactly the same rule as that laid down by Lord Esher in the case last cited and applied it in exactly the same manner, saying:

“Laying out of the case the opinions of foreign jurists, and all which does not properly bear on the point in question, I am inclined to think the damage in this case is to be considered as not arising immediately from a peril of the sea, although in a remote sense, it may be said to have been brought by a peril of the sea; but our rule of construction is, *causa proxima non remota spectetur*. The injury to the assured was caused by the sale of their goods; but no one will contend that the sale was an immediate consequence of a peril of the sea. The peril of the sea damaging the ship rendered it innavigable; to restore its navigability a reftment became necessary. The captain, who was interested in and bound to have the ship in a navigable state, being unable to raise the means for refitting her, was obliged to apply to the owners of the goods for a loan, through the medium of a sale of part of the goods. It was therefore a sort of forced loan which was the proximate cause of loss to the owners from the sale of their goods.

This was indeed connected with a peril of the sea, because a peril of the sea occasioned damage to the ship, which made repairs necessary, and funds to provide these repairs; but it was the want of funds *aliunde* which obliged the captain to have recourse to a sale of the goods. In conformity, therefore, to the rule that the proximate cause, and not that which is remote, is to be looked to, I think the underwriter is not liable. Giving the largest construction to the general words 'perils of the sea,' I think this is not a case of immediate loss by perils of the seas. Without going into an inquiry how far this resembles the case of jettison, or of general average, the discussion of which might arise future doubts, I say that perils of the sea are too remote a cause of the present loss to make the underwriter liable."

Lord Ellenborough's opinion was concurred in by Baily, J., and Abbott, J., the former saying:

"I am entirely of the same opinion. It does not appear to me that this was a loss by a peril of the sea, or such as entitled the assured to recover, under the general words of the policy; but a loss for which the owners of the goods will be entitled to be reimbursed by the owner of the ship."

\* \* \* "To hold this a loss for which the underwriter is responsible would be to make his liability depend upon the accident of the captain's being unable to provide funds for the repair, except by means of the goods." \* \* \* "Inasmuch, therefore, as we are bound, according to the common rule for the construction of policies, to look to the immediate cause of loss, and as this loss was not immediately caused by a peril of the sea, but by the inability of the captain to procure a fund for the repairs, which he was bound to do, it seems to me that this was not a loss within the policy."

In

*Greer v. Poole*, 5 Q. B. Div. 272,

a similar state of facts was presented and a similar ruling was made. The action was upon a marine policy of insurance which covered collision of the vessel. The ship having sustained damage by collision, was compelled to put into Gibraltar for repairs. The cargo, however, was undamaged. The master, not having funds with which to pay for the necessary repairs, made a bottomry loan upon the ship, freight and cargo. When the vessel thereafter arrived in Marseilles, the bond holder took proceedings to enforce his lien, and it became necessary for the owner of the cargo to pay a deficiency judgment in order to release his goods. He then sued his insurer claiming that his loss was due to the collision. Lush, J., said:

“The proximate cause of the loss, *to which alone our law has regard*, was the inability of the agent of the shipowner to pay off the charge which he had for want of funds at Gibraltar created on the cargo.”

In

*Meyer v. Ralli*, III Aspinall's Cases 324,

already discussed under an earlier heading in this brief, a similar application of the rule was made. In that case a vessel known as the “Unico” left Enos, a Turkish port, for Schiedam, in Holland, with a cargo consisting of 18,750 kilogrammes of rye, which the defendant insured to the owners. The “Unico” met with severe weather and was compelled to put into the French port of La Rochelle. Extensive litigation fol-

lowed in the English courts as a result of which on February 10, 1866, 5552 kilogrammes of rye were sold by order of the Tribunal of Commerce to pay for certain charges, and ultimately on January 10, 1867, the balance of the rye was sold to pay other charges. The "Unico" was a total loss and never completed its voyage, but it appeared that had the master of the vessel performed his duty, the balance of the rye other than the 5552 kilogrammes, could have been sent on to Schiedam, and made to bring a price greater than the total of the sums received upon the sale at La Rochelle, and all the charges which were decreed against it by the French court. The owners sued their insurer to recover their loss on the rye, alleging that it was proximately caused by the peril of the seas which had resulted in the loss of the "Unico." The English court held that the final and proximate cause of this loss was not the disaster to the "Unico" but was the result of the failure of the master of the "Unico" to perform his duty and transship the rye from La Rochelle to Schiedam. In so deciding, Archibald, J., said:

"It is quite clear, therefore, that if the captain had done his duty, the portion of the cargo sold on the 10th Jan., 1867, would have been forwarded to Schiedam, and that there would in the event have only been a partial loss, the portion of the cargo forwarded being only liable to pay so much of the freight of forwarding from La Rochelle (*Rosseto v. Gurney*, 11 C. B. 176; 20 L. J. 257, C. P.), as exceeded the original rate of freight." \* \* \*

"Under these circumstances, it is impossible not to see that, although the ship and cargo were originally brought within the jurisdiction of the



Tribunal of Commerce of La Rochelle by perils of the seas, *the sale of this portion of the cargo was not really due to any of the perils insured against, which had long ceased to operate in regard to this portion of the goods, but was in fact made for the purpose of paying advances incurred through the captain's breach of duty.*"

The case of

*Ionides v. Univ. Marine Insurance Co.*, 32 Law.  
 Jour. Com. Pleas 170; 14 English Ruling Cas.  
 271,

affords still another instance of application of the rule under discussion. In that case the plaintiff had shipped 6500 bags of coffee on the Str. "Linwood" from Rio de Janeiro to New Orleans and/or New York. The vessel left Rio May 26, 1861. On June 1, 1861, the "Linwood" arrived at the mouth of the Mississippi, and thence proceeded to New York. On June 17, 1861, the "Linwood" grounded off Cape Hatteras, the master having negligently mistaken his course. It appeared, moreover, that it was unknown to the master that the State of North Carolina was in a state of insurrection against the government of the United States, and that the light in the lighthouse on Cape Hatteras had been put out by the Confederates in order to embarrass Federal shipping. The "Linwood" belonged to Federal owners, and the cargo to British owners. The British owners (the plaintiffs) were insured by the defendant under a marine insurance policy which contained a warranty against loss resulting from hostilities. On July 19, 1861, 120 bags of the coffee were safely landed, and it was stipulated at the trial that but for the in-

terference of the Confederate militia, an additional 1000 of the bags could have been removed that day. On the 20th the vessel broke up and the balance of the 6500 bags of coffee were lost. The plaintiff sued the insurance company for the loss of all of the coffee with the exception of the 120 bags which were saved. The insurance company defended upon the ground that the proximate cause of the loss was not the negligence of the master in miscalculating his course, but that it was, in the first instance, the putting out of the light by the Confederates, and in the second instance the interference by the Confederates with the handling of the cargo. The court on these facts held the insurance company liable, but did so after the strictest application to the facts before it of the rule of proximate cause. It held that if the proximate cause of the loss had been the putting out of the light, or the subsequent interference with the landing, the loss would have been within the warranty against loss from hostilities, and the insurer would not have been liable, but it held, in the first instance, that the proximate cause of the stranding of the "Linwood" was the master's negligence in being off his course. In the second instance, it held that as to the 1000 bags of coffee the landing of which was prevented by the Confederates, the insurance company was not liable because they might have been saved but for the interference of the Confederates, and because, therefore, the proximate cause of their loss was the hostile act of the Confederates. As to the balance, however, it held the insurance company liable because, upon the facts stated, there was no possibility

of saving them after the vessel had stranded, and because it had concluded that the negligence of the master, and not the putting out of the Cape Hatteras light, was the proximate cause of the stranding.

The foregoing authorities establish the rule applicable under the English law to the situation involved in this case. That rule is, that when a vessel is stranded or sustains any loss through peril of the seas covered by the policy, nevertheless a recovery may not be had against the underwriters for any expense which is incurred by some later intervening cause. It only remains to show the application of the foregoing rule to the facts involved in the case at bar.

- (b) The reshipment on the "Mackinaw" was not proximately caused by the stranding of the "Pleiades", but was caused by the necessity which the plaintiff was under by reason of its contract with the Panama Canal Commission.

The "Pleiades" had returned to San Francisco by the latter part of September, 1912. She was ready to resume her voyage by December, 1912. There was no evidence whatever offered of the fact that the explosives were perishable, and indeed, if such evidence had been offered, it would not have justified a reshipment, but a sale of the goods. However, the matter is not left within the realm of conjecture, but the real reason for the *immediate* reshipment of the goods without awaiting the completion of the repairs on the "Pleiades" is definitely stated by Mr. Mulhern, the manager of the plaintiff corporation. Mr. Mulhern testified as follows:

“MR. FRANK. What was the necessity of getting that cargo forwarded at that time?

A. If we did not deliver it within a certain time we were subject to a penalty of one-tenth of one per cent per day and were liable to have the shipment refused. Upon the condition their contract provided for that.

I don't believe there is any market at the port of destination other than the Panama Canal Commission for any considerable amount of explosives, and particularly, for those grades, as one of them was a grade 45% and the other 60, and the demand for 60 is not nearly as great as the lower grades.” (Tr. p. 54.)

It must be taken, therefore, as an established fact that *the real and controlling reason* for the immediate transshipment of the explosives was the fact that the plaintiff corporation was under contract regulations with the Panama Canal Commission, and that the performance of its obligations to the Panama Canal Commission created a necessity for the immediate transshipment of the goods.

It requires no citation of authority to establish the point that the defendant underwriter was not bound in any way by the plaintiff's contract with the Panama Canal Commission, or by any obligation which the plaintiff corporation had assumed with reference to the ultimate disposition of the explosives after their arrival at Balboa.

Neither can it under any theory be contended that the loss to plaintiff under its contract with the Panama Canal Commission was a peril insured against under the policy of insurance.



The situation is a stronger one, for this reason, than any of those presented in the cases just cited. It bears a marked resemblance, however, to the situation in which the insured found himself in the cases of

*Powell v. Gudgeon*, supra,

*Greer v. Poole*, supra,

*Pink v. Fleming*, supra.

In each of those cases the insured found himself in a position, where, from causes with which the insurer had nothing to do, he was compelled to make certain expenditures.

In

*Pink v. Fleming*, supra,

after the vessel and cargo had been safely brought to port following the collision, the owner of the cargo sustained a loss through negligence of the stevedores, in the manner in which the cargo was handled while being unloaded.

In

*Powell v. Gudgeon*, supra,

the owner of the cargo sustained a loss because of the necessities of the captain of the vessel after the vessel had been safely brought to port after having suffered damage as a result of a peril insured against.

In

*Greer v. Poole*, supra,

the owner of the cargo sustained a similar loss resulting from the necessities of the captain after the vessel had been safely brought to port after encountering one

of the perils of the sea insured against. Here again the captain had been compelled to borrow money to make necessary repairs, and to hypothecate part of the cargo for that purpose. The court held that the loss occasioned to the owner in the redemption of the cargo, was not proximately caused by the original peril, but by the financial disability of the captain.

In all three of the cases, as well as in the other cases cited, the situation of the insured was strikingly similar to the insured in the case at bar. Here the vessel sustained a stranding, which was a peril insured against in the policy, but the vessel was brought to port in safety with the cargo unharmed, and might, for all that the insured knew at the time, and except for other contingencies which the policy did not cover, have completed its voyage, thereby rendering unnecessary the payment of any further reshipment charges. The return of the cargo to San Francisco, however, found the insured in a difficult situation which he had himself created, and against which the defendant had not insured. It found the insured under the obligation to immediately transship the goods, because of its contract with the Panama Canal Commission. For that reason, and for that reason alone (according to the positive statement of Mr. Mulhern, plaintiff's manager), the goods were forwarded at once upon the "Mackinaw", and the reshipment charges, which were subject to this litigation, were incurred. Upon these facts the application of the rule laid down by the English courts is clear. The proximate cause of the expenditure, therefore, was not the stranding of the

“Pleiades”, but was the fact that the plaintiff corporation had entered into a contract with the Panama Canal Commission, and was, for that reason, unable to permit the cargo to remain in San Francisco until at such time as the “Pleiades” should be repaired and resume her voyage.

- (c) **The avoiding of delay in the arrival of the cargo at port of destination was the controlling and proximate cause of the reshipment and the payment of the additional freight. Both under the law of England, and by the express provisions of the policy in suit, the insurer was not liable for losses occasioned by delay in arrival at port of destination.**

We have already pointed out by reference to the testimony of Mr. W. P. Mulhern, and otherwise, that the proximate cause of the reshipment on the “Mackinaw” was not the stranding of the “Pleiades”, but was the necessity under which the plaintiff found itself to avoid any delay in the arrival of the goods at the port of destination.

Under the law of England it is thoroughly settled that under the English form policy an underwriter is not liable for delay in the arrival of goods at port of destination in the absence of an express provision to that effect in the policy.

The English Marine Insurance Act of 1906, section 55, subd. (b):

“Unless the policy otherwise provides, the insurer on ship or goods is not liable for any loss proximately caused by delay, although the delay be caused by a peril insured against.”

In

*Taylor v. Dunbar*, IV Com. Pleas L. R. 206,  
the insurer sued the underwriters to recover damages sustained by a cargo of meat. It was shown that the vessel had met with tempestuous weather whereby the voyage had been delayed, and by reason of the delay had suffered from putrefaction. The court held for the defendant, the following opinion being rendered:

“Keating, J.—Mr. Beasley has referred us to every authority which could at all favour the view he wished to present; but they do not, in my opinion, go far enough to sustain his argument. The facts stated in the case show beyond a doubt that the proximate cause of the loss of the meat was the delay in the prosecution of the voyage. That delay was occasioned by tempestuous weather; *but no case that I am aware of has held that a loss by the unexpected duration of the voyage, though that be caused by perils of the sea, entitles the assured to recover upon a policy like this.* I think we should be establishing a dangerous precedent if we were to give effect to Mr. Beasley’s argument, seeing that there are so many cargoes which are necessarily affected by the voyage being delayed. I am not disposed to create such a precedent. I think our judgment ought to be for the defendant.

“Montague Smith, J.—I am of the same opinion. The loss here has arisen in consequence of the putrefaction of the meat from the voyage having been unusually protracted. That is a loss which does not fall within any of the perils enumerated in this policy. To render the underwriters liable, it must be shown that the loss is proximately due to one of the known perils. *Retardation or delay of the voyage is not one of them.* The case states that the meat was not affected by the sea or by the storm. It was not, therefore, as Mr. Beasley wished us to assume, damaged by knocking about. If it had been, the case might



have been brought within the principle of *Lawrence v. Aberdeen*, and *Gabay v. Lloyd*. But the statement in the case precludes us from drawing any such inference. If we were to hold that a loss by delay, caused by bad weather or the prudence of the captain in anchoring to avoid it, was a loss by perils of the sea, we should be opening a door to claims for losses which never were intended to be covered by insurance, not only in the case of perishable goods, but in the case of goods of all other descriptions. *By the common understanding both of the assured and assurers, delay in the voyage has never been considered as covered by a policy like this.* I therefore agree that our judgment should be for the defendant.

“Brett, J. I am also of opinion that damage to goods caused by delay of the voyage, through the consequence of stormy and tempestuous weather, is not one of the perils covered by an ordinary policy. *Such damage must have occurred many times, and yet no trace is to be found of such a claim being maintained. If it be desired, a clause may easily be inserted in the policy to meet the case.*” (Italics ours.)

Not only did the policy in the present case *not* contain a provision rendering the underwriters responsible for damages cause by delay, but, on the other hand, it was expressly provided in the policy as follows:

“Freight warranted free from any claim consequent upon loss of time whether arising from a peril of the sea or otherwise.”

It therefore appears that, both by reason of the English law with respect to general form policies, and by the express provisions contained in the policy sued under, the defendant in this case could not be held liable for any loss resulting proximately from delay in the arrival of the explosives at point of destination.

It being thus shown that the reshipment on the "Mackinaw" was made for the purpose of avoiding the consequences of delay in the arrival of the explosives at the port of destination, and it being further shown that under the English law, as well as under the express provisions of the policy, the insurer is not liable for damages caused by such delay, it follows that the District Court erred in not holding the defendant free from liability upon this ground.

- (d) The failure of the "Pleiades" to complete the voyage was caused by the insolvency of the California-Atlantic Steamship Company. Even had the plaintiff been willing to wait until the "Pleiades" was repaired, the proximate cause of the incurring of the reshipment charges would not have been the stranding of the "Pleiades", but the bankruptcy of the steamship company, which was a matter not insured against.

It is admitted that the "Pleiades" was returned to the California-Atlantic Steamship Company fully repaired and ready to complete her voyage, on December 27, 1912. It is also shown that the California-Atlantic Steamship Company became bankrupt on or about January 2, 1913, and that the "Pleiades" did not complete her voyage. From all that appears on the record the "Pleiades" could have proceeded on her voyage immediately after December 27, 1912. *On that date the effect of the stranding had been fully overcome.* If the "Pleiades" did not complete the voyage, it was because prior to January 2 or 3, 1913, her owners became insolvent.

For this reason it is clear that an additional intervening cause operated to prevent the completion of the

voyage. Had the defendant not been in a position by reason of its contract with the Panama Canal Commission which made it necessary for it to forward the cargo at once without awaiting the completion of the repairs on the "Pleiades", the voyage could have proceeded after December 27, 1912, and the plaintiff would not have been under any further liability with respect to the payment of additional freight. If, however, as stated, the voyage was never completed, it nevertheless appears that such failure was due entirely to the bankruptcy of the California-Atlantic Steamship Company. The effect of the stranding had been wholly overcome, and, but for said bankruptcy, the vessel could have proceeded on its voyage. The situation is one exactly analogous to one of the cases heretofore cited, where certain outside causes intervened and became the proximate cause of additional expenses being brought upon the assured, for which expenses the insurance company was not liable.

For the foregoing reasons it is respectfully submitted that the judgment of the District Court should be reversed with directions to enter judgment for defendant (plaintiff in error).

Dated, San Francisco,  
February 13, 1918.

Respectfully submitted,

EDWARD J. McCUTCHEN,

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

*Attorneys for Plaintiff in Error.*





No. 3037

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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FIREMAN'S FUND INSURANCE COMPANY

(a corporation),

*Plaintiff in Error,*

VS.

TROJAN POWDER COMPANY (a corporation),

*Defendant in Error.*

BRIEF FOR DEFENDANT IN ERROR.

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NATHAN H. FRANK,

IRVING H. FRANK,

*Attorneys for Defendant in Error.*



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## BRIEF FOR DEFENDANT IN ERROR.

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Throughout this brief we shall call the Trojan Powder Company "plaintiff", and the Fireman's Fund Insurance Company "defendant", their designation in the court below, instead of reversing their positions and titles, as is done in this court, which we think might lead to confusion.

The decision of this case rests principally upon the due appreciation of what are the material facts.

It appears to us that in the court below, as well as in this court, the appellant depends upon what appears to us to be a misapprehension in this regard. He dwells entirely upon matters that are

not determinative of the issue, and absolutely disregards those that *are* determinative. In so doing, he naturally creates false issues.

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### Statement of the Case.

In August, 1912, the defendant issued to plaintiff a policy of insurance in the sum of \$35,000.00, covering 6000 cases of high explosives laden on board the ship "Pleiades" for a voyage from the port of San Francisco to the port of Balboa, Isthmus of Panama.

The material provisions in that policy were as follows:

"And the said Company promises and agrees that the Insurance aforesaid shall commence upon the said Freight Goods and Merchandise from the time when the Goods and Merchandise shall be laden on board the said Ship or Vessel, Craft or Boat *as above* and continue until the said Goods and Merchandise be discharged and safely landed at *as above*."

The "*as above*" relates to the following provision of the policy:

"And it is hereby agreed and declared that the said Insurance shall be and is an Insurance (lost or not lost) *at and from San Francisco Bay to Balboa*."

The policy further provides:

"And touching the Adventures and Perils which the said Company is content to bear and does take upon itself in the Voyage so Insured as aforesaid they are of the Seas \* \* \*



and all other Perils, Losses and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the aforesaid subject matter of this Insurance or any part thereof."

Then follows the "sue and labor" clause, after which we have two clauses expressly referring to the bill of lading, as follows:

"General Average payable as per foreign statement or per York Antwerp Rules of 1890 if in accordance with the *contract of affreightment*.

It is hereby agreed that the rights of the assured shall not be prejudiced by the insertion *in the bill of lading* of the London conference rules of affreightment 1893, or of the following clause:

'The Act of God, perils of the sea \* \* \* and other accidents of navigation excepted, even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowners.'"

Then we have the particular average clause and the provision saving the "forwarding charges" from the effect of the particular average warranty:

"Warranted free from average unless general or the ship or craft be stranded, sunk or burnt  
\* \* \*

Underwriters notwithstanding this warranty to pay \* \* \* any special charges for warehouse, rent, reshipping or forwarding for which they would otherwise be liable, etc."

Then a provision making the laws and *customs* of England the rule of decision:

"All questions of liability arising under this policy are to be governed by the laws and customs of England."

The contract of affreightment contained a provision that

“It is agreed that said freight, whether pre-paid or to be collected, is to be considered as earned, vessel or goods lost or not lost at any stage of the entire transit, and *on the happening of any of the herein excepted contingencies*, the carriers are to have the right to forward the above mentioned packages to the port of destination on their own routes, and *shall receive extra compensation* for such service, *whether performed by their own vessels or those of strangers.*”

Among the “excepted contingencies” provided in said bill of lading, or contract of affreightment, were:

“*Stranding*, straining, any accident on or perils of the seas or other waters, or of steam or inland navigation; \* \* \* *detention or accidental delay*,” etc. (Back of Bill of Lading Par. 3.)

Under these conditions, the vessel, with said cargo on board, proceeded from the port of San Francisco on her voyage to the port of Balboa, and on the 16th day of August was stranded off the coast of Mexico, where the vessel, together with the cargo, was in danger of becoming a total loss.

While in this situation, on the 29th day of August, the plaintiff abandoned said cargo to the underwriters.

Thereafter the said vessel and cargo were salvaged, but the vessel was in such a damaged condition that she was unable to proceed upon her voyage, and

was brought back to the port of San Francisco for repairs.

The vessel was detained at the port of San Francisco until the 27th day of December following, and abandoned the said voyage entirely.

The said cargo had been discharged into lighters pending said repairs.

The plaintiff desired the cargo to be forwarded to the port of destination, and to this end conferred with the defendant, who declined to have anything to do with it. (Rec. p. 53.)

There were only two companies handling freight of that kind to the port of Ancon, Balboa, one of which was the charterer of the damaged vessel. (Rec. p. 53.)

Plaintiff applied to the said charterer to forward the cargo by its next vessel, the "Mackinaw", sailing October 17th, but said charterer refused to forward it *except upon the payment of extra freight money (\$4050.00), in accordance with the terms of their bill of lading.* (Rec. p. 53.) The payment was accordingly made and the cargo forwarded to its destination.

The cargo had been sold to the Panama Canal Commission, which had the privilege of refusing the shipment if it did not arrive within a fixed time, and there was no market at the port of destination for such cargo, there being no buyers other than the Panama Canal Commission. (Rec. p. 54.)

Though we do not consider this material, defendant does, and so we include it in this statement.

So far, the facts are undisputed.

It is set up in the complaint, Article V, page 6:

“That it is the law of England that if by reason of damage done to the ship, she cannot be repaired without very great loss of time, the master is at liberty to procure another ship to transport the cargo to the place of destination.”

This is admitted in the answer. (Art. V, p. 20.)

It is further alleged (Art. VI, p. 6) that

“It is the law of England that where freight is paid in advance, and the contract of carriage provides that it is to be considered as earned, vessel or goods lost or not lost at any stage of the entire transit, such freight is earned by the shipowner when the cargo is received on board; and the right of the shipowner thereto does not depend on the delivery of the cargo at the port of destination.”

This allegation is denied, though it is admitted that the right of the shipowner to prepaid freight does not depend on the delivery of the cargo at the port of destination.

Defendant, however, alleges that

“this does not relieve the shipowner of his obligation to exercise due diligence to carry the cargo so paid for forward to destination, and that freight paid in advance is not earned if the vessel or goods *be lost by any negligence* for which the shipowner is responsible.” (Italics our own.) (Rec. pp. 20, 21.)



What that has to do with this case, even if true, we cannot comprehend, as there is no allegation or proof of such negligence. Neither is there any proof otherwise to support the allegation.

It is further alleged that

“It is further the law of England that, in a case of marine insurance on merchandise, when, in consequence of a peril insured against, an extra freight must be paid by the cargo owner to bring the said merchandise to the port of destination, such expense is a loss directly due to such peril insured against for which the insurer is liable.” (Art. VII, p. 6.)

This is denied. (Rec. p. 22.)

The next cause of action sets up that under such a contract of carriage and the facts set forth,

“It is the practice and custom of underwriters in England to pay the excess of the expense to which the owner of the goods is put in bringing them to their destination over the freight originally paid, as a loss directly due to said peril,” (Art. VIII, pp. 11 and 12), —which is denied (pp. 28 and 29).

The fourth cause of action sets up the “sue and labor” clause.

The defendant sets up affirmative defenses, which are paraphrased as follows:

1. That the vessel was completely repaired, and was thereafter *able to complete* said voyage and carry said cargo to destination. (Italics our own.) (p. 34.)

That under the law of England it was the obligation of the carrier to transport said cargo to its destination *without requiring the payment of second freight*, and if plaintiff paid an additional freight, said payment was voluntary, without waiting for the completion of the repairs on said steamship, and it was not caused by the perils insured against and by the law of England did not constitute a liability under the terms of the policy.

2. That if by reason of the specific purpose for which said goods were intended, or of the contract under which said goods were sold, said goods could not be detained until the completion of the repairs of said steamer and thence forwarded in said steamer to the port of destination, under the law of England such extra freight as was paid did not constitute a charge or liability under said policy because not caused by perils insured against.

3. That the said extra freight was not in excess of the original freight, and was not due to any peril insured against by said policy, but resulted from the nature of the contract of carriage.

4. That if by reason of the contract of sale the goods could not be detained at the port of San Francisco until the completion of the repairs, such fact was not disclosed by plaintiff to defendant, and constituted concealment of facts material to the risk.

### Argument.

From the foregoing, the following facts stand out clear and undisputed:

1. That by reason of stranding and consequent damage, the vessel returned to the port of original shipment for repairs. That she was *detained* by the stranding and repairs for 4 months and 11 days, and *never thereafter proceeded upon the insured voyage*.

2. That, by the contract of affreightment, on the happening of stranding, detention or accidental delay, the carrier had the right to forward the merchandise either by its own vessels, or other vessels, and receive extra compensation for such service.

3. That the policy, expressly and in terms, recognizes that the insurance is effected and based upon the contract of affreightment or bill of lading. If this were not so expressly recognized, the contract of affreightment would still, under the law, as we shall presently see, be held to be the basis of the insurance.

4. That [admitted by the pleadings] it is the law of England that if by reason of damage done to the ship, she cannot be repaired without very great loss of time, the master is at liberty to procure another ship to transport the cargo to the port of destination. Of course, in so doing, the master acts as the agent of all concerned, and what the agent may do, his principals may do.

5. That [admitted by the answer] under the law of England the right of the shipowner to pre-paid freight does not depend on the delivery of the cargo at the port of destination.

6. We think it also proven beyond dispute that it is the law of England that under such contract of affreightment, the freight is earned by the ship owner when the cargo is received on board.

7. That the policy expressly provides that liability is to be governed by both the laws and the *customs* of England.

8. That the policy expressly provides that *notwithstanding* the free from average warranty, underwriters agree "to pay \* \* \* any special charges for warehouse rent, reshipping or forwarding for which they would otherwise be liable".

The case then reduces itself to the question whether or no the defendant would, under the laws *or the customs* of England, be liable for forwarding charges.

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## I.

**THEY ARE A DISTINCT CLASS OF LOSS, RECOVERABLE UNDER THE POLICY THOUGH NOT SPECIALLY ENUMERATED.**

The first thing, necessary for us, is to get clearly in our minds the nature, from an insurance point of view, of this loss. Though the context, in which forwarding charges are mentioned in this policy,



would warrant the construction that the policy treats them as an average loss (as do also the decisions which hold that recovery for such expenditure is excluded by the warranty free from particular average) it seems that by the customs and usage of England such charges are distinguished as “particular charges”, or, *in the terms of the policy*, “special charges for warehouse rent, reshipping or forwarding”.

Speaking of such charges, *Arnould*, in his work on *Marine Insurance* (8th Ed., Sec. 869), says:

“Another class of losses, which, *though not specially enumerated in the policy, are nevertheless recoverable thereunder*, is that which is embraced under the term ‘particular charges’. The distinction between ‘particular charges’ and ‘particular average’ was first definitely established in our Courts in *Kidston v. Empire Insurance Co.*, where the jury after hearing the evidence of several average-adjusters and other witnesses, found that there was in the business of marine insurance a well-known and definite meaning *affixed by long usage* to the term ‘particular average’ as distinguished from the term ‘particular charges’, viz., that ‘particular average’ denotes actual damage done to or loss of part of the subject matter of insurance, but that it does not include any expenses or charges incurred in recovering or preserving the subject matter of insurance; and that *expenses incurred in warehousing and forwarding goods* are not ‘particular average’, but are termed ‘*particular charges*’.

Accordingly sec. 64, sub-sec. (2), of the Marine Insurance Act states that ‘expenses incurred by or on behalf of the assured for the safety or preservation of the subject-matter

insured, *other than* general average and *salvage* charges, are called 'particular charges. Particular charges are not included in particular average'. They are recoverable from underwriters when incurred after the arising of a peril insured against, in order to prevent such peril causing a loss for which the underwriters would be liable if it were so caused. In this event they are charges incurred 'in and about the defense and safeguard' of the subject-matter of insurance, within the suing and laboring clause. In certain cases *they may also be recoverable* from underwriters, *apart from the suing and laboring clause*, as losses occasioned by a peril insured against *when they have been necessarily incurred in consequence of such a peril*—as, for example, *expenses of warehousing and forwarding cargo when a peril insured against has occasioned the necessity of such expenditure.*"

The same author thereafter (Sec. 214) says:

*"When, in consequence of a peril insured against, the voyage cannot be accomplished in the original ship, it seems that the excess of the expense to which the owner of the goods is put in bringing them to their destination over the freight which he would have had to pay in the ordinary course is a loss directly due to such peril. The practice of underwriters has been to pay such excess as particular charges, and as one of the objects of an insurance on goods is to guarantee that the goods shall reach their destination, it is submitted that this practice is correct in principle. It is certainly not inconsistent with the provisions of the Marine Insurance Act."*

It would seem that the foregoing is a clear and explicit statement on the part of that learned

author, that under both the law and *the custom* of England these particular forwarding charges are recoverable *even though not specially enumerated in the policy*.

Defendant's whole case rests upon the contention that "particular charges" partake of the nature of recoveries under the "sue and labor" clause, and are subject to the rule that they must *only* include expenditures *which tend to prevent the loss* for which recovery otherwise might be had against the underwriters. (Br. pp. 12 and 13.)

If that were true, there would be no such a classification as "particular charges". They would all be comprised in "sue and labor" charges, from which there would be no distinction. It is significant that, in this connection, the learned author does *not* agree with the defendant, but, after referring to expenses recoverable under the "sue and labor" clause, specifies this particular class of expenditures as "certain cases" which "may *also* be recoverable from underwriters, *apart* from the suing and laboring clause, *as losses occasioned by the peril insured against*".

It is our present purpose to bring out clearly this point of distinction between these "particular charges" and "sue and labor" charges, which appellant seems to confound.

It is conceded that, in order to recover under the "sue and labor" clause, it must appear that the expense was incurred *to prevent* the cargo from being

lost by an *impending* peril. A “particular charge”, however, may be different, in that it is not incurred in order to *prevent* a loss from *impending* peril, but is incurred *in consequence* of such a peril. That is, the peril is no longer impending, but, by reason of the peril—or in consequence of the peril—the *enterprise* or voyage insured is threatened with frustration and the expense is incurred to prevent that frustration.

That is the distinction which our learned author makes, and the distinction necessarily follows from the very nature of the expenses named by the learned author as being “particular charges”, namely, “expenses incurred in warehousing and forwarding the goods”.

Nothing can be more explicit than the author’s own language, namely:

“In certain cases they may also be recoverable from underwriters, *apart from the suing and laboring clause*, as losses *occasioned* by a peril insured against when they have been necessarily incurred *in consequence* of such a peril—as, for example, *expenses of warehousing and forwarding cargo*, when a peril insured against *has occasioned the necessity* of such expenditure.”

They are:

“Another *class* of loss, which, though *not* specially *enumerated in the policy*, are nevertheless recoverable thereunder.”

What is meant by having “occasioned the necessity of such an expenditure”, is further illustrated by what the author says in Sec. 214:



“When, in consequence of a peril insured against, *the voyage cannot be accomplished* in the original ship, it seems that the excess of the expense to which the owner of the *goods* is put in bringing them to their destination, over the freight which he would have had to pay in the ordinary course, *is a loss directly due to such a peril.*”

And it is a “loss directly due to such a peril” because, as the author further says in referring to the practice of underwriters to pay such charges:

“As one of the objects of an insurance on goods is *to guarantee that the goods shall reach their destination*, it is submitted that this practice is correct in principle.”

It will also be observed that it is admitted by the pleadings, that

“It is the law of England that if by reason of damage done to the ship she cannot be repaired *without a very great loss of time*, the master is at liberty to procure another ship to transport the cargo to the place of destination.”  
(Ans., Art. V, Rec. p. 20.)

The contract of affreightment also provides that the original freight is earned, ship or goods lost or not lost at any stage of the entire transit, and upon the happening of any of the excepted contingencies (stranding, *detention, accidental delay*), carrier shall have the right to forward the goods to port of destination and receive extra compensation.

In this connection the following from the *Great Indian Peninsular Railway* case, upon which defendant places so much reliance, is instructive:

“As the original contract of carriage was for a sum to be paid here, ship lost or not lost, the whole sum of £825, 11s., 7d., was an extra expense incurred by the owner of the goods, *in consequence* of the sea risk, which *had frustrated the voyage* of the ‘Bombay’; and the question we have to determine is, whether the insured can recover this sum on a policy containing *this warranty*”, namely the F. P. A. warranty. (Rec. p. 69.)

It seems to us from the foregoing, that nothing can be plainer than that the basis of these “particular charges” is not, as in the case of a “sue and labor” charge, that it shall “tend to prevent the loss for which recovery might otherwise be had”, but that it is sufficient if the loss insured against shall give rise to a situation rendering it necessary to incur the expense in order “that the goods shall reach their destination”, in accordance with the contract of affreightment.

This distinction applies with equal force and effect to the second proposition made by appellant in his brief (p. 29), namely:

“Neither the stranding of the ‘Pleiades’ nor any other peril insured against, was the proximate cause of the payment of the reshipment charges.”

Under the foregoing definition of the learned author, it is not necessary that the expense should have been proximately caused by the peril insured against, in the sense that an ordinary loss is caused by such peril, but it is sufficient that if, by reason

of a peril insured against, it became necessary to incur the expense in order that the goods shall reach their destination. This necessarily implies an intervening act of volition upon the part of the party charged with the duty of forwarding the cargo.

We will speak of this more in detail when we come to considering the cases. It is our present purpose to relieve the discussion of ambiguity cast upon it by the contention of the defendant.

Indeed, that ambiguity being disposed of, and a clear conception of the nature or foundation of these "particular charges" arrived at, it seems to us that the defendant's entire case is at an end.

More than this: Since the policy provides that the liability shall be determined by the *customs* of England, and since the learned author points out that it is "a practice of underwriters to pay such forwarding charges", we have, in that fact, a second conclusive answer to the defendant's contention, and a perfect case for the plaintiff.

There are some sub-heads in defendant's brief (pp. 39, 43 and 46), which are entirely beside the issue, and beg the whole question, and to which we shall give more specific attention later.

It nowhere appears in defendant's brief that he calls in question the foregoing statement of the law by *Arnould*, whose authority is as well established as

a decision of the House of Lords, and we might well rest upon it as the summing up of all the English law upon the subject. Nevertheless, it will not be out of place for us to examine the cases found in the record, touching this subject.

Before doing so, however, and for fear that a misapprehension might arise therefrom, we call attention to the suggestion of defendant (Br. pp. 12 and 13), that

“The theory under which the recovery was allowed in this case was, therefore, that the payment of the \$4050 was a ‘particular charge’ and partook of the nature of *particular average*. Particular charges are not, however, included in particular average under the express provisions of the English Marine Insurance Act.”

From the foregoing analysis in explanation of the ground of said recovery, it will readily be seen that defendant’s suggestion is not entirely correct. The theory of the recovery is, as stated by *Arnould*, that they are “another *class* of losses, which, though not specially enumerated in the policy, are nevertheless, recoverable thereunder.”

Moreover, in the above statement, defendant overlooks the custom, above referred to, as a ground of recovery.

Neither do we think that the section of the Insurance Act, referred to by defendant (Sec. 64, Br. p. 13), in anywise helps his case. On the con-



trary, it supports our theory and contention. It defines "particular charges" and expressly distinguishes them from, not only "average charges" but also "salvage charges", which is only another term for "sue and labor" charges.

If, however, the distinction were to rest upon the theory suggested by defendant, we are still not convinced that it would not be right, because the policy, *in order to avoid what the underwriter deemed would otherwise be the effect of the warranty free from average*, makes a special provision that "notwithstanding this warranty" he shall pay these particular charges.

Now, what construction must be placed upon that language of the policy, other than that the underwriter considered the charges in the nature of particular average charges, liability for which, by reason of the warranty free from average, would be excluded under the policy, were it not for the "notwithstanding" clause?

We shall presently see that this is the result of the cases relied on by defendant, viz., *Great Indian Peninsula Railway Co. v. Saunders*, and *Booth v. Gair*, and that it is the result of this view of the charges taken in those cases [namely, that they are in the nature of particular average], that caused the adoption of the "notwithstanding" clause.

"It is upon this warranty that our judgment depends." "The question we have to determine is whether the insured can recover this

sum on a policy *containing this warranty.*"  
(*Great Indian etc.*, Rec. pp. 68, 69.)

This reason for the adoption in the policy of the "notwithstanding" clause is reflected not alone in the above mentioned provision in the Marine Insurance Act (Sec. 64), which provides that "particular charges are not included in particular average", but also by Sec. 76, sub-sec. 2 of that Act, which is, in effect, a *direct legislative overruling* of those decisions. It is as follows:

"Sub-sec. 2. Where the subject matter insured is warranted free from particular average, either wholly or under a certain percentage, *the insurer is nevertheless liable* for salvage charges, and for *particular charges* and other expenses properly incurred pursuant to the provisions of the 'suing and laboring' clause in order to avert a loss insured against." (Rec. p. 161.)

CUSTOM AND USAGE.—This custom and usage, we think, is satisfactorily proven by the foregoing excerpts from *Arnould on Insurance*, but we have added thereto the authority of the cases we shall refer to, so that there shall be no question. This proof is undisputed, and, as we think, concludes the controversy in the present case.

Whether or no the charges be recoverable under the English law, it is sufficient, under the terms of this policy, that it is the practice or custom of the English underwriters to pay the same.

Indeed, as we shall presently show, this practice of the underwriters has been so incorporated into

the law of England, by virtue of the proof before and recognition by the English courts, as in itself to become a part of the common law of England.

The foregoing charges thus become payable by the underwriters regardless of any technical construction of the policy, and *regardless* of whether or no a peril insured against be the *proximate cause* of the expenditure. *It is sufficient to say that it is the custom of underwriters to pay them.*

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#### CONSIDERATION OF THE CASES.

It will be noticed that the cases relied upon by the plaintiff at the hearing were introduced for three purposes: one, and principally, to prove the custom and usage of underwriters to pay this class of loss; another, to show that under the English law the expenditure is considered a loss by the perils of the sea; and a third to illustrate the evolution of the "notwithstanding" clause attached to the "warranted free of particular average" clause, and thereby incidentally demonstrating that, *so far as the construction of this particular policy is concerned*, "special charges" are to be treated as being in the nature of a particular average loss.

The two principal cases relied on by the defendant are also relied upon by the plaintiff.

The *defendant* uses them to prove that these expenditures cannot be recovered under the "*sue and labor*" clause, and also to avail himself of cer-

tain dicta which appear therein. The plaintiff uses them (one at least) to prove the custom to which we have adverted, and also to illustrate the evolution of the “notwithstanding” clause, as it appears in the present policy, which, in its turn, serves to fix upon the policy a construction which renders the insurer liable within the meaning of the phrase in said “notwithstanding” clause, “for which they would otherwise be liable”.

We refer to the cases of the *Great Indian Peninsula Railway Co. v. Saunders*, Best & Smith, Q. B. 41, and, on appeal, 2 Best & Smith, Q. B. 266 (misquoted in the record as Ellis, Best & Smith), and the case of *Booth v. Gair*, 15 Com. Bench, 290:

In the former, the ground of the decision in the lower court was, that the loss, not being a total loss, was excluded *by the warranty against particular average*. We have already referred to a part of the language of the court applicable to this question, namely:

“It is upon this warranty that our judgment depends.” (Rec. p. 68.)

Again (and this is also important in its effect upon defendant’s contention that it is not bound by the terms of the bill of lading):

“As the original contract of carriage was for a sum to be paid here, ship lost or not lost, the whole of this sum of £825, 11s., 7d., was an extra expense incurred by the shippers of the goods, *in consequence of the sea risk which had frustrated the voyage of the ‘Bombay’*; and the question we have to determine is, whether the



insured can recover this sum on a policy containing this warranty." (Rec. p. 69.)

Again:

"We are of opinion that, if he could recover, it would be on the ground that the disbursement for the extra freight was part of the loss occasioned to the owner of these particular goods by the perils of the sea, or, in other words, a particular average on these goods, and, therefore, within the warranty." (Rec. p. 69.)

If we stop to consider this proposition we cannot escape the conclusion that, but for the warranty against particular average, the insurer must be liable. The court, however, said that it was not called upon to determine that question, though it had been so determined in America.

The loss, however, cannot be excluded by the warranty *against* particular average unless it be regarded *as a particular average loss*. And if it be such a loss it is recoverable in a case, as the one at bar, where the application of the warranty is expressly withdrawn from that loss, to say nothing of the warranty being opened by the stranding, in both of which particulars the case at bar differs from those now under consideration.

Indeed, it is plainly evident, from the history of the law upon this subject, that the "notwithstanding" clause in these policies is the direct result of those decisions, and an effort on the part of the underwriters and assured to avoid their effect in this respect. It practically concedes that the expenditure is itself an average loss. This, be it

understood, was the situation during the earlier discussion of the question at issue.

The case also decided that the expenditure was not recoverable under the "sue and labor" clause, and defendant rests his reliance on the case to defeat the present recovery, upon the reasoning employed to show that it is not recoverable *under the "sue and labor"* clause. In this respect, we think we have already sufficiently indicated our distinction.

But defendant entirely ignores that part of the decision which holds that the loss is excluded by the "warranted free from average" clause.

This case was affirmed on appeal (2 B. & S. 266) on the same two grounds, the court, however, giving its principal attention to the "sue and labor" liability.

BOOTH v. GAIR, 15 C. B. R. (N. S.) 290, was introduced by plaintiff, principally to supplement the proof of the custom and practice of underwriters to pay such charges.

That was a policy on cargo. It contained a "sue and labor" clause and also a warranty "free from particular average unless general".

After leaving New York the vessel met with sea perils, put into a port of refuge, where she was condemned and sold and part of her cargo transhipped to Liverpool at a freight exceeding the freight originally agreed on.

In this connection, it is well to note the difference between our freight agreement and the one in the above case. Ours was prepaid, and hence earned freight, while, evidently, the other was only earned on delivery at port of destination. Hence only the excess would be lost. Ours is also "excess freight" because the original freight was entirely lost.

That excess freight was the subject matter of the controversy.

The case was decided on the authority of *The Great Indian Peninsula Railway Co.* case, and hence is subject to the same comment respecting the nature of the loss (particular average) that we made on the latter case.

*Booth v. Gair*, however, contains another element, pertinent to the case at bar.

It will be recalled that under our policy the liability is to be governed by the *customs* of England, and in *Booth v. Gair* the following appears:

"10. It was also admitted that, down to the date of the policy in this case, it was the custom of underwriters to pay charges on cargo of the nature of the items the subject of this case, except cooperage, under policies in the form of the policy in this case, under the name of 'particular charges'."

Now, the court did not decide the case in accordance with that custom, because, as explained in the subsequent case of *Kidston v. Empire Marine Ins.*

*Co.*, 1 C. P. L. R. 535, the custom could not be permitted to change the terms of a written contract.

In the *Kidston* case the court comments at length upon both of the above cases (Rec. pp. 102-106), and not only says that in those cases "the decision and the *sole* decision" was, that in the case of goods "warranted free of particular average" recovery could not be had for such expenses under the "suing and laboring" clause (Rec. p. 103), but also points out with considerable clearness the error which those cases have undoubtedly made in considering only a contracted and special meaning of the word "average". (Rec. pp. 100-101.)

We will turn to this again. Suffice it to say, that the court there says that the cases "when examined prove to be anything but authority for the defendants". (Rec. p. 106.)

In returning, now, to the question of "custom", we find in the *Kidston* case the custom was again proven, and is stated in the report in the language used by *Arnould*, and quoted by us at pages 11-12 ante. It was upon a finding of the jury upon this custom that a verdict was entered for the plaintiff. (Rec. p. 91.)

In the language of the report:

"The evidence given was for the purpose of showing that the charges of transshipping and forwarding had been considered to be what was called technically 'particular charges', and not particular average so as to be within the warranty. The verdict passed for the plaintiff's affirming the existence of the usage at the time when the policy was made." (Rec. p. 93.)



Again referring to the cases of *Great Peninsula Ry. v. Saunders*, and *Booth v. Gair*, the court says (Rec. p. 102):

“Before these decisions, the liability of the underwriter appears to have been *universally admitted* and acted upon *even* in the cases where the expenses were incurred to forward goods *existing in specie* at the port of distress, and warranted free from particular average, *so that no liability could accrue to the underwriters by their not being forwarded.*”

Pausing here for a moment, we have from the foregoing this deduction to make: Before these decisions the liability had been “universally admitted and acted upon”. Those decisions are, therefore, the chief, if, indeed, not the only reliance of defendant. But those decisions rested upon the exclusion of liability by the warranty “free from particular average”, while in our policy, *the effect of these decisions is avoided* by the provision that “notwithstanding” the warranty “free from particular average”, these charges shall be paid, if otherwise liable. If, but for these decisions, the liability had been “universally admitted and acted upon”, it follows that our insurer is “otherwise liable”. This also confirms our former suggestion that it was in order to avoid the effect of these particular decisions that the “notwithstanding” clause was adopted.

Defendant in the case at bar calls attention to the fact that in the *Kidston* case the insurance was *on freight*, while the case at bar is insurance on

*cargo*—which is true, and which, so far as regards the holding in the *Kidston* case that the loss was recoverable under the “sue and labor” clause, might be a valid distinction. But it does not affect the principles laid down in that case, nor the distinctions and criticisms therein of the *Great Indian Peninsula* and *Booth v. Gair*, and particularly it does not affect the question of proof of custom.

Connected with these particulars, we invite a careful and critical reading of that case—particularly we invite attention to what is said concerning the changing significance of the word “average” as a word used in a great variety of phases as applied to different subject matters, and not with any fixed or settled application. (Rec. 100-101.)

Concerning the sufficiency of this method of the proof of the custom, we need not waste any time in discussion, because it is admitted (Rec. p. 110.)

However, the language of the court in *Biddel Bros. v. Clement Horst Co.*, 16 Comm. Cas. 202-03, is interesting in this connection. (Rec. pp. 110-111.)

We come next to the two cases of

POPHAM & WILLETT V. ST. PETERSBURG INS. CO., 10 Comm. Cas. 31, and the same volume, page 276, to be found in the Record between pages 71 and 83, inclusive.

This was an insurance on goods *and* freight for a voyage from London to places in Siberia via the Kara Sea.

So far as the landing, warehousing and forwarding charges are concerned, *they were claimed under insurance on goods.*

The assured was carrying in his own or a chartered vessel, goods, belonging, some to himself and some to other parties. The goods that belonged to other persons were, upon the return of the vessel to the port of shipment, returned to their owners, and freight claimed under the terms of the bill of lading. The case concerned only the insurers *own* goods that were forwarded to their destination through Russia. (Rec. 73 bottom, 74 top):

“The plaintiffs claimed in the action a total loss under the policies on freight and on goods; *also for a partial loss on the policies on their own goods, and for landing, warehousing, and forwarding expenses.* On the claims for total loss, the learned judge held that if there had been a total loss, it was a constructive loss, and that the plaintiffs, having given no notice of abandonment, they could not recover on those claims. *The present report deals with the case only so far as it relates to the obstruction by ice and to the claim for landing, warehousing and forwarding expenses, in which the plaintiffs included the increased duty paid, as above stated.*”

We see, therefore, that the distinction which defendant claims between policy on *freight*, and policy on *cargo*, does not exist, with respect to this case.

It will also be borne in mind that after the obstruction by ice, the goods, as in the case at bar, were *returned to the port of shipment*, and were thereafter transshipped to the port of destination by another and different route.

The court said that the first question was whether or no the obstruction by ice was “a peril of the seas within the meaning of the policy”, and held that it *was* such a peril. The court then continues:

“With regard to the partial loss of *goods*, different considerations apply, because the absence of notice of abandonment does not prevent the plaintiffs from recovering for any partial loss which they, in fact, have suffered. They claim the expenses which have been incurred for landing, warehousing, and forwarding the goods. It is said that these expenses are not recoverable because the forwarding of the goods was not forwarding them upon the voyage insured—that the voyage insured was altogether abandoned as an adventure, and that the subsequent forwarding of the goods was a mere incident in their history, and on a totally different adventure.”

The court overruled this objection, and held that they were entitled to recover for any partial loss suffered in consequence of the vessels being *prevented from arriving at their destination* by the ice.

It then takes up the question as to whether or no the duty paid could be recovered as part of the forwarding expenses, and held that it *could*.

That is the whole subject matter of that decision, namely, that the forwarding expenses of the goods were a *loss by a peril of the seas* within the meaning



of the policy, and could be recovered as a partial loss notwithstanding the "warranted free from average".

It is claimed, however, that the policy contained an express provision "to pay landing, warehousing and forwarding charges, as well as partial loss arising from transshipment and reshipment", and that the decision rested necessarily upon the proposition that the policy expressly insured the matters for which recovery was thus allowed.

Now, it will be seen from the foregoing decision, that the court was expressly and only *passing upon* the "*landing, warehousing and forwarding*" *expenses*, as the subject of the loss, and was *not* passing upon any "partial loss arising from *transshipment*". It will not, therefore, do to lay stress upon the last phrase of the forwarding provision by italicising the same, as defendant does (Br. p. 9), namely, the phrase "as well as partial loss arising from *transshipment* and reshipment", because, under the terms of the policy, the forwarding charges and the partial loss from transshipment are specifically named as *two different subject matters*. In the language of the policy, the partial loss therein named, *is not descriptive of the forwarding charges*. The difference between these two items, to our mind, is, that the "partial loss arising from transshipment or reshipment" refers to *damage to the goods arising from the transfer from one vessel to the other*. In other words, where the damage to the goods is caused by such transfer, and not directly caused by

the peril of the sea, that is also to be paid for. The forwarding charges are a different matter. This definition is supported by *Gow* (p. 187) and set out in this brief, post p. 36.7. The phrase is the equivalent of the provision in our policy likewise attached to the "forwarding" clause, viz.: "also to pay the insured value of *any package* or packages which may be totally lost *in transshipment*". The loss of a single package, is, of course, under our policy, a partial loss of the subject of insurance.

Under this construction of the policy, it is the same in effect as the policy in the case at bar, and the decision that the forwarding charges are recoverable, is a direct decision that they are recoverable in the case at bar. In the case at bar, we have "warranted free from average", yet, notwithstanding this warranty, underwriters to pay the forwarding charges. In the *Popham* case, the report (which is the only means we have of determining the terms of the policy), expressly places these two phrases in connection with each other. (Rec. p. 72.)

In view of the former decisions, hereinbefore commented upon, that the "warranted free from particular average" relieves the insurer from liability for forwarding charges, this placing of the two provisions in juxtaposition, when considering insurance on cargo, shows exactly what the court had in mind. Otherwise, if as claimed by defendant, the agreement to pay landing, warehousing and forwarding charges was an independent subject matter of insurance, it would not have been neces-

sary to refer to the "warranted free from average", at all. It would have been sufficient to have said that the policy insured that subject matter.

This view finds support in the second *Popham* case, where the court does not refer to the "warranted free from average" clause at all, but refers to the "sue and labor" clause in connection with the "to pay landing, warehousing and forwarding" charges, etc., because it is insurance on *freight*.

It will also be noticed that the first case was decided in November, 1904, while the *Great Indian Peninsula* case was decided in 1861.

The second *Popham* case is of interest to us because of the holding therein that the freight, being, by the *terms of the bill of lading*, payable when the goods were returned to London (the port of shipment) after the failure of the expedition, *whether the goods were forwarded or not*, was lost—that the assured are entitled to recover these forwarding expenses, and are not bound to give credit *for that which they have not saved*, namely, "the amount of the freight".

The next case referred to by defendant is that of *MEYER V. RALLI*, 3d Aspinw. 324. This is a case offered by the defendant.

We do not understand the purpose of the offer. The case was not one where a recovery of forwarding charges was under consideration. The cargo was covered by a policy of insurance warranted

free of particular average, and contained a "sue and labor" clause. The vessel was taken in distress to the port of La Rochelle, where the cargo was landed and warehoused under an order of the court, and all of it sold under decree of the court. The freight money with the exception of one hundred and fifty (150) pounds, was unpaid, and the court held that the freight was due in its entirety, and condemned the plaintiffs to pay the same, and it was ultimately paid out of the proceeds of the cargo.

The questions that arose in the case were:

"First, whether there was a constructive total loss of the cargo;"

"Secondly, if not, whether the plaintiff is entitled to recover any and what portion of the expenses under the '*sue and labor*' clause". (Rec. pp. 149, 150.)

As neither of these questions are under consideration in the present case, the materiality of the case does not appeal to us. The court held that after the cargo had been unshipped it was in a state of heat and partial fermentation from sea water, and if it had been allowed to go on, it would have resulted in an actual total loss, and hence plaintiff could recover under the "sue and labor" clause.

The following language of the court, however, is of interest:

"It cannot be contended, since the case of *Kidston v. Empire Marine Assurance Company* (L. R. 1 C. P. 535; 2 Mar. Law. Cas. O. S. 400, 468), that the warranty 'free from particular



average' excludes the operation of the suing and labouring clause; and that case is also an authority that the occasion upon which the expenses in this case were incurred, was such as to be within it. As to the cases of *Great Indian Peninsula Company v. Saunders* (1 B. & S. 41; 2 B. & S. 266; 6 L. T. Rep. 297; 31 L. J. 206, Q. B.), and *Booth v. Gair* (9 L. T. Rep. 386; 33 L. J. 99; 15 C. B. N. S. 291), cited to us by the defendants, we need only refer to the way in which they are distinguished by Willes, J., in his learned judgment in *Kidston v. Empire Marine Assurance Company*." (sup.)

There is absolutely no question in that case with regard to average or particular charges.

The quotation from

GOW ON INS., p. 186 (Rec. p. 120), in no wise affects our contention that under the terms of the policy, insurers are liable for the forwarding charges as "special charges", or as *Arnould* and insurance adjusters term them, "particular charges". On the contrary, it confirms such contention, for it expressly refers to "warehousing, reshipping and forwarding charges" as being *always* charged by the shipowner

"against the cargo, and are admitted by law in certain cases as properly chargeable. Underwriters agree to assume responsibility for their proportion of such charges, and this arrangement was embodied in what is known as the forwarding clause."

The mere fact that they had changed the form so as to exclude "special charges" not already thus

recognized as included in “an ordinary English ‘clean’ policy”, does not justify the argument that it was intended to exclude “warehousing, reshipping and forwarding charges”, which the author says are always “charged against the cargo and admitted by law in certain cases as properly chargeable”, and for which the underwriters agree to be responsible.

Any other construction of the policy would render the clause useless, for if under the ordinary form of the policy underwriters were not liable, what purpose could be served by providing that the “Warranted free from average” shall not exclude them—“Underwriters, notwithstanding this warranty to pay” them?

But defendant stopped at the wrong place in his quotation from *Gow*. Following his quotation we find (*Gow*, p. 187):

“Such were the stages in the history of the F. P. A. clause as it is now known. At a general meeting of the underwriting community of the United Kingdom, assembled at Lloyd’s on the 17th July, 1883, a form of clause was adopted which has become the customary English form, and is, in absence of any special agreement between assured and underwriter, *the* F. P. A. clause; it reads:

‘Warranted free from particular average unless the vessel or craft be stranded, sunk, or burnt, each craft or lighter being deemed a separate insurance. Underwriters, notwithstanding this warranty, to pay for any damage or loss caused by collision with any other ship or craft, and any special charges for warehouse rent, reshipping or forwarding, for which they

would otherwise be liable. Also to pay the insured value of any package or packages which may be totally lost in transshipment.<sup>1</sup> Grounding in the Suez Canal not to be deemed a strand, but underwriters to pay any damage or loss which may be proved to have directly resulted therefrom’.

<sup>1</sup>*Transshipment* means generally the act of transferring goods from a vessel in which they have been carried to another vessel for the completion of their voyage. If taken strictly, its application in this clause is confined to the mere act of lifting from the earlier vessel to the later vessel employed in the carriage of the goods, or if a lighter or other craft is employed to carry the goods between the vessels—from the earlier vessel to the lighter and from the lighter to the later vessel. It is reasonably extended to the conveyance between the two vessels, but does it include any stay on quay in case the first vessel discharges direct on to quay and the second loads direct from quay? So long as the stay on quay is merely incidental to the removal from one vessel to another, the inclusion of the risk for a moderate time is not unreasonable, but the moment that stay becomes delay or storage the case becomes doubtful”.

Three things are apparent from this conclusion:

1. The “forwarding charges” are considered in connection with and as part of the F. P. A. clause, giving support to our contention that it was considered at least of the nature of “particular average”.
2. That the underwriters adopted it in 1883, showing that at that date they formally expressed their dissent from the ruling in the *Great Indian Peninsula* case; and,
3. That “transshipment” is not synonymous with “forwarding”, but is simply

the act of transferring from one vessel to another, as suggested in our review of the *Popham* case, ante, p. 28. 3/.

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### Résumé.

To sum up, therefore, we find that defendant rests his entire argument upon the authority of the *Great Indian Peninsula Railway v. Saunders*, as a case “directly in point and that it should control the determination of this branch of the case.” (Br. p. 29.)

In the foregoing, we think we have satisfactorily shown that it is not even applicable to this case, much less an expression of the English law of the present day.

We have shown that it is not only pointed out in the *Kidston* case that, in the *Great Indian* case the “court carefully abstained from deciding the question now before us” (Rec. p. 103), but the *Kidston* case also definitely established the distinction between “particular charges” and “particular average”. (*Arnould*, Rec. p. 57.)

Again: So far as the present case is concerned, the *Great Indian Peninsula* case rested upon the fact that the right of recovery was excluded by the F. P. A. clause, while in our case such effect, if any, of the F. P. A. clause, is avoided by the “notwithstanding” clause.

Again: In our case the F. P. A. clause is opened, and its effect thus destroyed, by virtue of the fact that our vessel stranded.



In this connection, it will be noticed that in the *Great Indian Peninsula* case it was expressly noted that the vessel "was neither stranded, sunk or burnt" (Rec. p. 68), thus emphasizing the distinction.

Again: The question of custom was not involved in the *Great Indian Peninsula* case, while in our case it forms an independent basis of decision.

And lastly: The principle upon which the *Great Indian Peninsula* case was decided, and hence the case itself, is expressly overruled by an Act of Parliament, namely, the Marine Insurance Act, Sec. 76, sub-sec. 2, as well as Sec. 64.

In addition, we have the later authority of *Popham & Willitts v. St. Petersburg Insurance Co.*, 10 Comm. Cas. 31.

We must conclude, therefore, that *Arnould* is right in his statement of the present law of England touching this subject, not only by reason of his own great authority, but also by reason of the cases and statutes which we have reviewed.

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## II.

### PROXIMATE CAUSE.

It remains only to notice the contention made by defendant under the head of "Proximate Cause".

1. If we be right in our foregoing contention, namely, that the forwarding charges are "particular charges", which under a cargo policy are neither

salvage charges, nor particular average charges, but a third class of loss, which, though not directly caused by the peril insured against, nevertheless arise from a situation such as renders it necessary to incur the expense in order that the goods shall reach their destination, then the question of proximate cause, in the strict sense, becomes immaterial. In fact, as shown in the earlier part of this brief, *Arnould* considers such a charge as, in fact, "a loss directly due to such peril" because

"one of the objects of the insurance on goods is to guarantee that the goods shall reach their destination."

We note, in this connection, that the author does not say that it is a loss directly *caused* by such peril, but "a loss directly *due* to such peril", thereby indicating the distinction for which we are contending, between such a loss and other losses, with respect to the rule of proximate cause.

On the other hand, even the *Great Peninsula* case, regards the extra freight as "part of the loss occasioned to the owner of these particular goods by perils of the sea" because it frustrated the voyage. (Rec. p. 69.)

So in the *Kidston* case it is noted that before the *Great Peninsula* case underwriters universally admitted the liability, even where the goods existed in specie and no liability would accrue by their not being forwarded. (Rec. p. 102.)

And in the *Popham* case it was expressly held that where a peril *prevented the vessel from arriving*

*at her destination*, such forwarding charges were a *loss by a peril of the sea* (ante, p. 30).

So it seems to us that the question of proximate cause does not properly arise in this case.

2. Moreover, the facts upon which defendant rests his contention, that the peril of the sea was not the proximate cause of the payment of the reshipment charges, do not constitute a fair statement of the case. His argument is based upon the following:

“Two other distinct causes intervened, making the reshipment necessary; first, the contract of the plaintiff with the Panama Canal Commission with the resulting necessity of the plaintiff to avoid delay in the performance of such contract; and, second, the bankruptcy of the California Atlantic Steamship Company, the owner [charterer] of the ‘Pleiades’ which resulted in the abandonment of the voyage.”  
(Br. p. 30.)

(a) Let us consider the latter first:

The statement itself is a mere inference drawn from the fact that the vessel was redelivered to the California Atlantic Steamship Company on December 27th, and that the plaintiff received notice of the bankruptcy January 1st or 2nd, and the ship never went on the voyage. (Rec. p. 54.)

In the first place, there is no necessary connection between the bankruptcy of the charterer and the failure of the vessel to complete the voyage, for there was nothing to prevent the owner of the ship from completing the voyage.

But be that as it may, the bankruptcy of the charterer cannot be held to be the cause of the incurring of forwarding charges on goods *actually forwarded on another vessel of the same charterer* [the “Mackinaw”], leaving port on October 17th. The California Atlantic Steamship Company *did* carry the cargo forward to its destination, and that, too, at a time when it does not appear to have been bankrupt.

So it is a plea of despair that attempts to assign such bankruptcy as an intervening cause making the reshipment necessary.

As already suggested, it may, or may not, have been a cause why the vessel, after being repaired, did not proceed upon the voyage. But that is immaterial in the present case, because both by the terms of the bill of lading and the admitted law of England.

“If by reason of damage done to a ship she cannot be repaired *without a very great loss of time*, the master is at liberty to procure another ship to transport the cargo to the place of destination.” (Ans. Art. V, Rec. p. 20.)

Also:

“On the happening of any of the herein excepted contingencies [stranding \* \* \* detention or accidental delay], the carriers are to have the right to forward the above mentioned packages to the port of destination on their own routes, and shall receive extra compensation for such service.” (Bill of Lading.)

It was not, therefore, essential, as contended by defendant, that the goods should be detained, during



this long delay in repairs, in order that they might be forwarded in the original vessel. Both under the law and the terms of the contract, the right to forward the goods by another vessel was given to the plaintiff.

Indeed, had they gone forward in the original vessel, the original freight having been earned at the time of the stranding and the vessel returned to her original port of destination, a second freight would also have been payable under the contract of carriage.

As said by this court in the case of *Portland Flour Mills Co. v. British & Foreign Marine Insurance Co.*, 130 Fed. 680: 863-64

"The contract as made between the parties is a valid one that can be enforced." It is competent for the parties to a contract of affreightment to stipulate expressly that the freight, or a part thereof, shall be payable absolutely at the time of the shipment of the cargo, or at a certain time thereafter, without regard to the performance of the contract." *Citing and quoting De Sil*

So how could the bankruptcy of the charterer, or the necessity of plaintiff to avoid delay under its Panama Canal contract, be a cause of the incurring of these extra expenses? *Se Popl anti. brief anti.*

(b) And yet defendant further claims that:

"The contract of the plaintiff with the Panama Canal Commission with the resulting necessity of the plaintiff to avoid delay in the performance of such contract, must be taken

as the real and controlling reason for the *immediate transshipment* of the explosives.”

Well, and what of it? If the expense must be equally incurred whether the goods be *immediately* transshipped, or sent forward after the repairs, any *reason* for *immediate* rather than *later* transshipment is immaterial, because the expense is not thereby increased.

(c) But here another principle intervenes. *Arnould* says,

“One of the objects of an insurance on goods is to guarantee that the goods shall reach their destination”,

for which reason that author says,

“That the practice of underwriters \* \* \*  
to pay such excess as particular charges” \* \* \*  
“is correct in principle.”

So, again, in *Barker v. Blakes*, 9 East’s Rep. p. 282, Lord Ellenborough said:

“And thinking, as we do, that the impossibility of prosecuting the voyage to the place of destination, which arose during and in consequence of the *prolonged detention of the ship and cargo*, may be properly considered as a loss of the voyage; and such loss of voyage, upon received principles of insurance law, as a total loss of the goods which were to have been transported in the course of such voyage; provided such loss has been followed by a sufficiently prompt and immediate notice of abandonment,” etc. (Rec. pp. 58, 64-65.)

So, also, reverting again to the language of the *Great Indian Peninsula* case (Rec. pp. 68, 69):

“As the original contract of carriage was for a sum to be paid here, ship lost or not lost, the whole of this sum of £825, 11s., 7d., was an extra expense incurred by the shippers of the goods, in consequence of the sea risk which *had frustrated the voyage of the ‘Bombay’.*”

In *Embiricos v. Sydney Reid & Co.*, (1914) 3 L. R., K. B. D., p. 54, Scrutton, J., laid down the following principle:

“Commercial men must not be asked to wait till the end of a long delay to find out from what in fact happens whether they are bound by a contract or not; they must be entitled to act on reasonable commercial probabilities at the time when they are called upon to make up their minds.”

This is recognized in the admitted legal principle so often referred to, namely,

“If by reason of damage done to a ship she cannot be repaired without a very great loss of time, the master is at liberty to procure another ship to transport the cargo to the place of destination.”

This would seem to end the discussion regarding the necessity of plaintiff to avoid delay in the performance of its Panama Canal Commission contract, as being the controlling reason for the immediate shipment of the explosives, and therefore the proximate cause of the loss.

Whatever the controlling reason for acting, the fact that the ship could not be repaired without a very great loss of time conferred the right, and the reason for exercising the right becomes immaterial,

so long as the plaintiff was acting "on reasonable commercial probabilities at the time when they are [it is] called upon to make up their [its] mind."

In the *Embericos* case, the ship was detained because the Dardanelles were closed to her passage; thereafter, during seven days, other ships were allowed to pass, and this ship, had she been loaded within her lay days, *could also* have passed—but never did, as in our case the "Pleiades" might have gone forward, but never did. Were we to wait to find out "by what in fact happened" if she ever would go forward only to find out that she would not?

In the last mentioned case, the court referred to "the well-known doctrine of frustration of the commercial adventure, laid down in *JACKSON v. UNION MARINE INS. CO.*, (1874) (L. R. 10 C. P. 125)."

That was a case of insurance on chartered freight.

The plaintiff, a shipowner, entered into a charter-party by which the ship was to proceed with all possible dispatch (dangers and accidents of navigation excepted), from Liverpool to Newport, and there load a cargo of iron rails for San Francisco.

The ship sailed from Liverpool on the 2nd of January, and on the 3rd went aground in Carnarvon Bay. She was got off by the 18th of February, and proceeded to repair, completing her repairs at the end of August.

In the meantime, on February 15th, the charterers threw up the charter, and employed another ship



to carry the rails (which were wanted for the construction of a railway) to San Francisco.

Concerning the necessity of forwarding the rails, the defendants raised the point that "the loss of freight was not the immediate consequence of the sea damage, but of the right exercised by the charterers of throwing up the charter-party, which they might, or might not, have done, and in doing which they were influenced by the exigency of the particular case, and the necessity of getting the rails to San Francisco as soon as possible." (10 L. R., 10 C. P. 127.)

In an action by the plaintiff on the policy of insurance on chartered freight, the jury found that "*the time necessary* for getting the ship off and *repairing her*, was so long as to *put an end, in a commercial sense*, to the commercial speculation entered upon by the shipowner and the charterers." (L. R. 10 C. P. 126.)

The court held that

"There is a condition precedent that the vessel shall arrive in a reasonable time. On failure of this, the contract is at an end and the charterers discharged, though they have no cause of action, as the failure arose from an excepted peril. The same result follows, then, whether the implied condition is treated as one that the vessel shall arrive in time for that adventure, or one that it shall arrive in a reasonable time, that time being, in time for the adventure contemplated. And in either case \* \* \* non-arrival and incapacity by that time ends the contract; the principle being, that, through non-performance of a condition may be excused,

it does not take away the right to rescind from him for whose benefit the condition was introduced." (L. R. 10 C. P. 145.)

Under these facts, the court held that there was a loss of freight by perils of the sea, and to the suggestion that the proximate cause of the loss was the refusal of the charterers to load, the court said, that

"the voyage, the adventure, was frustrated by perils of the sea, both parties were discharged, and a loading of cargo in August would have been a new adventure, a new agreement." (p. 148.)

The court further said,

"Even if not, the maxim does not apply," that in case of goods carried part of the voyage, and ship lost, but goods saved, the ship owner may carry them on, but is not bound. But if he does not, his freight is lost. So, if he does not choose to repair the ship, which remains in specie, but is a constructive total loss.

The judgment for the plaintiff was affirmed.

It seems to us that this is a parallel case to the one at bar, so far as the question now raised by the defendant is concerned; in our case, the right to forward the cargo in case of an unreasonable delay being expressly given, both by the admitted law of the country, and by the contract of affreightment. True, the parties were not bound to forward it at once, but they were permitted to forward it at once, and, as said in the *Jackson* case, the maxim *causa proxima non remota* does not apply.

We are conscious that the foregoing cases are not contained in the record on appeal, but the opening statement of plaintiff in his brief, that the determinations by the District Court of the question of English law were \* \* \* merely conclusions of law, relieves us of any embarrassment in that regard.

Moreover, the English law, unlike Continental law, being evidenced in its reports the same as American law, and such reports being freely consulted by our courts in determining questions of American law, there can be no incongruity in a case of this sort, in turning to the English Reports to ascertain the rule whether or no the cases have been specifically placed in evidence at the trial. Besides, this being a common law case, if erroneously decided, must be sent back for a new trial, where this case could then be introduced, and the same result attained as if judicial notice were now taken of it by this court.

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(d) In view of the foregoing, it would appear unnecessary to refer to defendant's point "c" (Br. p. 43), wherein he appeals to Sec. 55, Subdiv. b of the Marine Insurance Act.

Though we feel it fully answered in the foregoing, we do not care, for the mere sake of brevity, to pass it by.

He says:

"Both under the law of England and by the express provisions of the policy in suit, the insurer is not liable for losses *occasioned* by delay in arrival at the port of destination."

He cites *Taylor v. Dunbar*, 4 C. B., L. R. 206, and ~~and~~ points to the warranty in the policy of "*freight free from claims consequent upon loss of time*", etc., and sets out the statute.

Now, what does the rule contained in those authorities mean?

*Taylor v. Dunbar* was a case where a cargo [meat] *putrified* because the vessel, by reason of bad weather, did not make her expected time on the voyage. It was the deterioration of the *goods* because of delay, a direct action upon the subject-matter of insurance.

The rule of that case is expressed in the statute referred to:

"Unless the policy otherwise provides, the insurer on ship or goods is not *liable for any loss proximately caused by delay*, although the delay be caused by perils insured against."

Now no such condition exists in this case. We are not seeking to recover "for any loss proximately caused by delay".

In the first place, there was no delay. We shipped the goods without delay.

In the next place, there was no damage to the goods.

Defendant's reference to the terms of the policy is also unfortunate, for he fails to appreciate the effect of the warranty to which he calls attention. It is *confined to freight*. Being so confined, would it not, where nothing else appears, lead to the con-



struction that other subjects of insurance are not free from such claim? Again, “*loss of time*” being thus expressly provided for in the policy for a single subject of insurance (which is not the subject here in controversy), it follows that “*loss of time*” was necessarily in contemplation of the parties when the insurance was effected, and therefore included within the provision of the policy.

“All other perils, losses or misfortunes that may have or shall come to the hurt, detriment or damage of the aforesaid subject-matter of this insurance or any part thereof.”

We respectfully suggest that, by reason of the above mentioned warranty, “*loss of time*” being a peril “specifically mentioned in the policy”, is included within the term “all other perils”, within the meaning of the rule of construction laid down in the Insurance Act, namely, “The term ‘all other perils’ includes any perils similar in kind to the perils specifically mentioned in the policy.” (Rec. p. 121.)

If so, it is “otherwise provided in the policy” within the meaning of that language in the section of the Insurance Act above referred to.

We respectfully submit that the judgment of the District Court should be affirmed.

Dated, San Francisco,  
February 25, 1918.

NATHAN H. FRANK,  
IRVING H. FRANK,  
*Attorneys for Defendant in Error.*



No. 3037

IN THE  
**United States Circuit Court of Appeals**  
**For the Ninth Circuit**

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FIREMAN'S FUND INSURANCE COMPANY

(a corporation),

*Plaintiff in Error,*

VS.

TROJAN POWDER COMPANY (a corporation),

*Defendant in Error.*

**REPLY BRIEF FOR PLAINTIFF IN ERROR.**

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EDWARD J. McCUTCHEN,

McCUTCHEN, OLNEY & WILLARD,

*Attorneys for Plaintiff in Error.*

FILED

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U. S. DISTRICT COURT,  
SAN FRANCISCO, CALIF.





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## REPLY BRIEF FOR PLAINTIFF IN ERROR.

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It is not our intention to restate at length the principles upon which this cause should be decided and the judgment of the District Court reversed. Nevertheless, the argument advanced by defendant in error is so falacious in most of its essential particulars, and so revolutionary in its attempt to overturn settled principles of English marine insurance law, that we deem it necessary to call the court's attention thereto, lest it should be misled by the adroitness with which it is made.

As we read defendant in error's brief, it contends in effect that particular charges are to be recovered as particular average; that forwarding charges are by the custom of England a loss under the policy, and

that the doctrine of proximate cause should be overturned. To this we cannot subscribe.

**Forwarding charges are recoverable as particular charges.**

There is nothing in Sections 869 and 214 of *Arnould on Marine Insurance* which detracts from our contention that forwarding expenses and particular charges are only recoverable as such. It will be noted from the remarks of the author (Arnould) in Sec. 214 that he expressly refers to the *Kidston* case as his authority for that portion of the text quoted on page 12 of defendant in error's brief. That case holds, in consonance with Sec. 64 of the Insurance Act, that excess freight is collectible as a particular charge and not as particular average, because incurred to save what would otherwise have been a loss on the underwriters. The author expressly states in Sec. 214 that the practice is to pay such excess as particular charges. This is said not to be inconsistent with the provisions of the Marine Insurance Act, but Sec. 64 expressly states that particular charges are those expenses incurred by or on behalf of the assured *for the safety or preservation of the subject matter insured*. That the author has no thought of breaking away from this principle is shown by the unquoted portion of Sec. 214.

Defendant in error makes strenuous effort to avoid the condition of the expenses being incurred *for the safety of the subject matter insured*, for the very apparent reason that the forwarding expenses here involved were not incurred for that purpose, but to avoid a possible loss by delay. To accomplish that result,

however, this court would be required to disregard Sec. 64 (2) of the Act. To suggest such necessity demonstrates the fallacy of the argument.

Nor does the policy in suit contain a direct insurance of the forwarding charges, as did the policy in the Popham case, and the attempt of defendant in error to construe the marginal clause to that effect (brief pp. 18-19) absolutely disregards the words "for which they would otherwise be liable". The effect of the clause is simply to provide that the underwriters are to be liable for any special charges for forwarding for which they would otherwise be liable *but* for the F. P. A. warranty. That is far from providing an absolute liability for forwarding charges as a direct insurance. But to ascertain for what forwarding charges the underwriters would be liable, the court must look to the law and not to the policy for the policy makes no other provision in respect thereto. The law, however, makes forwarding charges recoverable as particular charges, and the latter only include expenses incurred for the safety or preservation of the subject matter insured. Nor is there anything in the so-called history of the F. P. A. clause which detracts from those principles.

Notwithstanding all that defendant in error says, we press upon the court that the principles enunciated in *Great Indian Peninsula Ry. Co. v. Saunders* and *Booth v. Gair* are decisively in our favor, and that they do not hold that forwarding charges are recoverable as particular average. All that is said in the former case is "that, *if* he could recover, it would be on the

ground that the disbursement for extra freight was  
 \* \* \* a particular average," but that is far from  
 holding that they are recoverable as particular average.  
 The presence of the word *if* gives an entirely different  
 construction to the court's opinion. And so in *Booth*  
*v. Gair*, the court does not go as far as the court in  
 the former case, and whatever it has to say about the  
 custom of underwriters is to the effect that charges  
 on cargo were paid as *particular charges*. Neither case  
 supports the contention that forwarding charges are  
 a direct liability or particular average, but classifies  
 them as particular charges. And recovery was not  
 allowed in those cases because the forwarding expenses  
 did not save the underwriters from any loss but for  
 which they would otherwise have been liable. The fact  
 that the policies contained the F. P. A. warranty does  
 not distinguish the cases because the forwarding ex-  
 penses to Panama in the instant case no more saved  
 plaintiff in error from a loss for which it otherwise  
 would have been liable than did the payment of freight  
 in the cases cited preserve the subject matter from a  
 total loss. The only loss saved by forwarding the  
 powder so far as the record shows was a possible  
 penalty under the contract of sale, the existence of  
 which was unknown to plaintiff in error.

The cases of *Popham & Willett v. St. Petersburg Ins. Co.* involved, as we have pointed out, policies which directly insured forwarding charges as a straight liability. Liability was not made to depend, as in the present case, upon the general principles of the law, but was grounded upon an absolute insurance of for-



warding charges as such. They were lifted from the category of particular charges, and nothing that defendant in error has to say successfully controverts this distinguishing characteristic.

**There is no custom of England fixing liability for the forwarding charges.**

Defendant in error strains at an effort to prove liability under and alleged custom of England. Such a custom would be in direct conflict with the provisions of the Marine Insurance Act and the leading cases which we have cited. But even at that, it fails to show the custom.

If the court will closely examine the opinion in the *Kidston* case, it will note (Record p. 91) that several average adjusters were called to prove that \* \* \* "expenses incurred in warehousing and forwarding are not particular average, but are termed *particular charges*," the very rule for which we contend and strictly in consonance with the provisions of the Insurance Act. And this is recognized by Arnould in Sec. 214.

Certainly defendant in error falls far short of proving the alleged custom by such authorities.

**Proximate cause.**

Recognizing that the proximate causes of the loss in the case at bar were not insured against, defendant in error attempts to circumvent it by an extended argument intended to show, as it says on page 40 of its brief, that the question of proximate cause becomes immaterial.

But it cannot be immaterial unless the court shall set aside the settled principles of English Marine insurance law as stated by Lord Esher in *Pink v. Fleming*, 25 Q. B. D. 396, and the other cases cited in our opening brief pp. 30-39. And those principles are material for the *causa proxima* in the present case was not, as we have pointed out, a peril insured against. The cause of the loss for which recovery was sought was far removed from sea perils; it was due to a desire to avoid loss by delay, and this, as shown by *Taylor v. Dunbar*, 4 C. P. L. R. 206, etc., is not a loss under the policy.

As for the suggestion of commercial frustration, there were better grounds for applying that doctrine in *Gt. Indian Peninsula Ry. Co. v. Saunders* and *Booth v. Gair*, than in the case at bar, for there the vessels were total losses, whereas here the "Pleiades" was repaired, if the doctrine has any application, yet it was not even referred to by the court. But here the venture was not frustrated because the "Pleiades" was repaired and could have carried the cargo forward, but for defendant in error's desire to avoid a loss consequent upon the delay.

The case of *Jackson v. Union Marine Ins. Co.* is not in point for it is totally dissimilar in fact. There the charterer threw up the charter and the shipowner then collected under a chartered freight policy,—an entirely different proposition than the attempt of the cargo owner to recover forwarding charges incurred to avoid a loss by delay.

**An insurer is not bound by the peculiar provisions of a bill of lading under which the insured chooses, without notice to the insurer, to ship its cargo.**

The plaintiff in error is not bound by any and every provision of the bill of lading under which the cargo was shipped. It did not have any notice of its terms, and although those terms may be binding upon the carrier and shipper, it is obvious that the plaintiff in error did not contract with reference to its peculiar terms.

*Schroeder v. S. L. T. V. G.*, 66 Cal. 294, 299.

There is not any showing in this record that plaintiff in error had any knowledge of the provision of the bill of lading that the freight was to be deemed earned vessel lost or not lost and in the absence of such showing we submit it is improper to hold that plaintiff in error is charged with notice of that provision.

We also desire to call the attention of the court to the recent case of *The Allamvilde*, 247 Fed. 236, where the rule was laid down that where a vessel returns to her port of departure on account of stress of weather, her owner cannot retain the prepaid freight and refuse to carry the cargo to destination, even though the bill of lading provides that freight is deemed earned vessel lost or not lost.

We respectfully submit that for the reasons herein and heretofore urged in our opening brief the judgment

of the District Court should be reversed with directions to enter judgment for defendant (plaintiff in error).

Dated, San Francisco,

May 11, 1918.

Respectfully submitted,

EDWARD J. McCUTCHEN,

McCUTCHEN, OLNEY & WILLARD,

*Attorneys for Plaintiff in Error.*











